Office-Supreme Court, U.S.
FILED
FEB 27 1981
ALEXANDER L. STEVAS,
CLERK

80-1464

No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTIONS PRESENTED

1. Whether Section 8(a) of the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. (Supp. II)

* The named defendants-appellees in the court of appeals were Cecil D. Andrus, who was Secretary of the Interior, James R. Schlesinger, who was Secretary of Energy, and the United States of America. Because Secretary Watt and Secretary James B. Edwards are the successors to Secretaries Andrus and Schlesinger, we have substituted them as federal parties to this suit, pursuant to Rule 40.3 of the Rules of this Court.

The named plaintiffs-appellants in the court of appeals were Energy Action Educational Foundation, Consumer Federation of America, Consumer Energy Council of America, Michigan Citizens Lobby, Arkansas Consumer Research, Inc., Service Employees International Union, International Association of Machinists, Citizen/Labor Energy Coalition, Texas Consumer Association, M. James Doling, Paul Casagrande, Kathleen F. O'Reilly, California State Lands Commission, and City of Long Beach.

1337, enumerating specific bidding systems for lease sales of oil and gas on the Outer Continental Shelf, requires the Secretary of Energy to promulgate regulations for each of those systems, and the Secretary of the Interior to use each of them in actual lease sales.

2. Whether the plaintiffs in this case have standing to sue.

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The Solicitor General, on behalf of the Secretary of the Interior, the Secretary of Energy, and the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-54a) is not reported. The opinion of the district court (App. C, *infra*, 57a-73a) is not reported. The court of appeals also issued an earlier opinion in this case, on December 20, 1979 (App. D, *infra*, 75a-100a), which is reported at 631 F.2d 751.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1980 (App. B, *infra*, 55a-56a). On January 15, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629, 38 U.S.C. (Supp. II) 1331 *et seq.*, are reprinted in App. E, *infra*, 101a-106a.

STATEMENT

This action was brought by three individuals, seven consumer groups, two labor organizations, and two California governmental entities, against the Secretaries of Energy and the Interior, and the United States. The complaint sought, *inter alia*, to require the defendants to promulgate regulations for

the various bidding systems enumerated in Section 8(a) of the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. (Supp. II) 1337(a), and to prohibit the conduct of lease sales on the Outer Continental Shelf without such regulations. On October 30, 1980, the United States Court of Appeals for the District of Columbia Circuit entered an opinion agreeing with the plaintiffs' interpretation of the statute (App. A, *infra*, 1a-54a) and an order requiring the Secretary of Energy to issue the contested regulations (App. B, *infra*, 55a-56a).

1. The first federal statute enacted to permit the development of oil and gas resources on the Outer Continental Shelf ("OCS") was the Outer Continental Shelf Lands Act of 1953, ch. 345, 67 Stat. 462, 43 U.S.C. 1331 *et seq.* It directed the Secretary of the Interior to establish and administer a leasing program to develop the oil and gas resources of the Outer Continental Shelf.[1] Section 8(a) of the Act, 43 U.S.C. 1337(a), provided for bidding by sealed bids. Two systems of bidding for leases were available "at the discretion of the Secretary." Bidding could be "[1] on the basis of a cash bonus with a royalty fixed by the Secretary at not less than 12½ per centum in amount or value of the production saved, removed or sold, or [2] on the basis of royalty, but at not less than the per centum above mentioned, with a cash bonus fixed by the Secretary." *Ibid.*

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[1] As the court below explained (App. D, *infra*, 76a-77a n.2), the term "Outer Continental Shelf" embraces all submerged lands of the Shelf lying seaward of the areas conceded to the coastal States by the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.* (usually a three-mile belt from shore), "and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. 1331(a).

Prior to 1978, virtually all of the lease sales were issued under the cash bonus bid-fixed royalty method.[2] Under that system a lease was awarded to the qualified bidder who made the highest cash bid deemed acceptable to the Secretary on a particular tract. The lessee was then required to pay a royalty, established in advance of the sale, as a fixed and constant percentage of the value of the production. The royalty was required to be at least 12½%; in practice it was almost always 16⅔% (see App. A, *infra*, 7a & n.13).

In 1978, Congress enacted comprehensive amendments to the Act (Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629, 43 U.S.C. (Supp. II) 1331 *et seq.*). Section 102 of the Amendments (43 U.S.C. (Supp. II) 1802) sets out the purpose of Congress: the Amendments are designed to preserve, protect, and develop the oil and gas resources of the OCS in a manner which is consistent with the need to make such resources available as rapidly as possible, to balance resource development with protection of the environment, to insure the public a fair and equitable return on the resources of the OCS, and to preserve and maintain free enterprise competition (43 U.S.C. (Supp. II) 1802(2)).

To assist in achieving those purposes, Section 205 of the Amendments, 92 Stat. 640, extensively changed Section 8 of the 1953 Act. Section 8(a)(1) (43 U.S.C. (Supp. II) 1337(a)(1); App. E, *infra*, 101a-103a), authorizes the Secretary of the Interior to grant leases to qualified bidders by competitive bidding under regulations promulgated by the Sec-

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[2] A few leases in 1974 and 1977 were on the basis of royalty bidding with a fixed cash bonus (App. A, *infra*, 7a n.13).

retary of Energy.[3] The bidding shall be by sealed bid and "at the discretion of the Secretary," on the basis of bidding systems set out in paragraphs (A) through (H) of the subsection.

The bidding method described in Section 8(a)(1)(A) is the traditional cash bonus bid-fixed royalty method. Paragraphs (B) through (G) set out other approaches, including the variable royalty bid-fixed bonus method, the cash bonus bid-sliding scale royalty method, and various methods that contain net profits and work commitment components. Two of these paragraphs are of particular concern here: Paragraph (E), the "fixed cash bonus with the net profit share reserved as the bid variable"; and Paragraph (G), the "work commitment bid based on a dollar amount for exploration with a fixed cash bonus and a fixed royalty." In contrast to the preceding paragraphs, paragraph (H) is a "catch-all" category that permits the use of other, non-specified bidding systems. Under Section 8(a)(4)(A) (43 U.S.C. (Supp. II) 1337(2)(4)(A); App. E, *infra*, 103a), the Secretary of Energy must submit any such unspecified system to the Congress; the system may then be used by the Secretary of the Interior unless either House passes a resolution of disapproval within 30 days.

Section 8(a)(5)(B) (43 U.S.C. (Supp. II) 1337(a)(5)(B); App. E, *infra*, 104a) is the only provision in the 1978 Amendments that expressly constrains the "discretion" granted in Section 8(a)(1) to the Secretary of the Interior. Section 8(a)(5)(B)

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[3] Under the Department of Energy Organization Act of 1977, Pub. L. No. 95-91, 91 Stat. 565, 578, 42 U.S.C. (Supp. II) 7152(b) (App. E, *infra*, 101a), the bidding system regulations of Section 8(a)(1) of the OCS Lands Act, are to be issued by the Secretary of Energy, in consultation with the Department of the Interior.

provides that the Secretary is to apply the cash bonus bid-fixed royalty system to between 40 and 80% of all acreage offered annually and to experiment with the other systems on the remaining 20 to 60% of the acreage offered, unless the Secretary determines that those limitations are inconsistent with the purposes and policies of the Act. In addition, under Section 8(a)(9)(D) (43 U.S.C. (Supp. II) 1337(a)(9)(D); App. E, *infra*, 104a), the Secretary of Energy is required to consult with the Secretary of the Interior and submit a yearly report to Congress, setting out which bidding methods have not or will not be used, and explaining the reasons for the decision not to use them. See also 43 U.S.C. (Supp. II) 1343(2)(A) (App. E, *infra*, 105a-106a).

The Secretary of Energy has issued regulations under Section 8(a)(1) for the use of several of the defined bidding systems.[4] Final regulations governing bidding systems authorized by Section 8(a)(1)(A)-(C) (cash bonus bid-fixed royalty, royalty bid-fixed cash bonus, and cash bonus bid-fixing sliding scale royalty), were promulgated on February 5, 1980. 45 Fed. Reg. 9536. Final regulations for a cash bonus bid-fixed net profit share bidding system were promulgated on May 14, 1980. 45 Fed. Reg. 36784. The Department of Energy also requested comments on possible bidding systems utilizing a work commitment component in a notice published July 25, 1980 (45 Fed. Reg. 49586); it is cur-

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[4] While the regulations governing the alternative bidding systems were being promulgated, the Secretary of the Interior continued to issue leases under the systems authorized in the original 1953 Act as Congress intended. H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 138 (1977).

rently developing a proposed regulation. A proposed regulation governing a bidding system with net profit share as the bidding component will be issued for public comment on or before February 28, 1981.[5]

The Secretary of the Interior has prepared, approved and sent to Congress a five-year oil and gas leasing program pursuant to Section 18 of the OCS Lands Act, as amended, 43 U.S.C. (Supp. II) 1344. The program provides for 36 sales with approximately seven sales each year. The first three sales were held in September, October and November of 1980. The next six sales are scheduled in consecutive months beginning in May, 1981.

2. This action was commenced with the filing of a complaint on June 22, 1979 (J.A. 1-84).[6] In that complaint respondents claimed that the Secretary of Energy had failed to issue regulations for all the bidding systems set out in Section 8(a)(1), and that the sale of OCS leases in the absence of those regulations violated the Act (J.A. 75-76). Respondents also claimed that the Secretary of the Interior's use of the cash bonus bid-fixed royalty bidding system, both before and after the 1978 Amendments, was an abuse of the Secretary's discretion in offering leases under the OCS Lands Act (J.A. 77-83).

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[5] On remand to the district court, the parties stipulated to the entry of an order requiring the Department of Energy to issue a final regulation for a variable net profit share bidding system by May 25, 1981, and a variable work commitment bidding system by June 30, 1981.

[6] "J.A." refers to the Joint Appendix prepared for the first appeal of this case. No Joint Appendix was prepared for the second appeal, due to the time constraints of the expedited appeal.

On June 25, 1979, four days before the scheduled opening of bids at Lease Sale 48, respondents filed a motion for a preliminary injunction seeking to prevent further lease sales "in the absence of regulations establishing the full range of bid systems mandated by the Outer Continental Shelf Lands Act" (J.A. 129, 131). After a hearing, the district court denied that motion, ruling that respondents had not shown a likelihood of prevailing on the merits (J.A. 293), and that the defendants had not acted arbitrarily and capriciously in failing to promulgate some of the regulations authorized in Section 8(a)(1) "in light of the complexity and sensitivity involved in preparation of such regulations" (J.A. 294). Respondents appealed to the United States Court of Appeals for the District of Columbia Circuit, which affirmed. In its opinion, authored by the late Judge Leventhal, that court discussed the statutory scheme (App. D, *infra*, 86a-87a; emphasis in original; citation omitted):

> Congress enacted the provisions dealing with lease bidding after exhaustively reviewing the Secretary's 25-year record of administering the OCS Act. It cannot be doubted that Congress had the opportunity to discard the cash bonus-fixed royalty system or to restrain the Secretary's discretion in according it substantial use. In essence, it chose to do neither.
>
> Congress declined to omit cash bonus-fixed royalty bidding when it rewrote § 8(a) of the OCS Act. That section continues to provide that lease bidding, "at the *discretion* of the Secretary," may be on the basis of cash bonus-fixed royalty bidding or fixed bonus-variable royalty bidding. Other bidding options were added to the list, though authorizing regulations for those systems must be promulgated in advance of their use.

> But Congress did not stop there. The Secretary's discretion in choosing among alternative bidding systems was limited in one crucial respect. Elsewhere in that section, at §8(a)(5)(B), Congress mandated that cash bonus-fixed royalty bidding be utilized in a large percentage of leases. * * * Congress affirmatively intended that subsequent to passage of the amendments, cash bonus-fixed royalty bidding was to be used in at least 40% of all leases each year for five years. The only limitation put on use of this option was that it should not be used for more than 80% of the leases.

The court also stated that on remand, the district court might consider a number of factors regarding the Secretary of the Interior's choice of bidding methods, and whether the Secretary of Energy's delay in issuing profit sharing regulations or the Secretary of the Interior's failure to experiment more widely might constitute a violation of the Act (App. D, *infra*, 96a-97a).

After the case had been remanded to the district court, both parties moved for summary judgment on the issue of whether the 1978 Amendments require promulgation of regulations implementing all bidding systems set out in Section 8(a)(1).[7] Respondents also sought a preliminary injunction to prevent future lease sales until regulations were promulgated. On September 17, 1980, the district court denied all motions (App. C, *infra*, 60a-61a, 74a). Respondents appealed from the denial of their motion for

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[7] Petitioners also contended that the Secretary of the Interior's continued use of the cash bonus bid-fixed royalty bidding system was an appropriate exercise of his discretion (App. C, *infra*, 65a, 66a).

preliminary injunction.[8] On September 29, 1980, the court of appeals entered an order affirming the district court's denial of a preliminary injunction for the sales scheduled in September, October and November 1980 (App. A, *infra*, 2a-3a & n.5). The court reserved jurisdiction over the case to decide all remaining issues presented by the appeal.

3. The court of appeals issued a subsequent opinion and judgment on October 30, 1980 (App. A, *infra*, 1a-54a; App. B, *infra*, 55a-56a). That opinion took note of the fact that the appeal was taken from the denial of a preliminary injunction. Nonetheless, in the interest of judicial economy and to provide guidance for the litigation on remand, the court decided to rule on the "basic statutory issue dominating this protracted litigation"—the scope of the duties imposed by the alternative bidding provisions of the 1978 Amendments to the OCS Lands Act (App. A, *infra*, 23a).

The court relied primarily on legislative history to establish that a primary purpose of the 1978 Amendments was to foster experimentation among various bidding systems in order to find alternatives to the traditional cash bonus bid-fixed royalty method (App. A, *infra*, 25a-35a). In light of that history and the expressed statutory purposes in 43 U.S.C. (Supp. II) 1802(2), the court rejected the view that "the Secretary [of the Interior] is free to choose to experiment with some but not other bidding system options * * * [and] to ignore the options that do not involve front end cash bonuses as the bidding variable" (App.

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[8] On the motion of respondents, the appeal was expedited. Three days were allowed for simultaneous briefing, and argument was held on the following day.

A, *infra*, 29a). Accordingly, the court concluded "that the Secretary of Energy does have a statutory obligation to promulgate regulations on the major alternatives to front end cash bonus bidding, including the variable net profit share bidding option" (*id.* at 34a).[9]

The court also found that progress in promulgating regulations for the new methods had proceeded too slowly to permit the required experimentation (App. A, *infra*, 46a-50a). The court concluded that "the balance of public equities" supported the district court's refusal to enjoin the 1980 lease sales, but that "it should be feasible" for regulations governing sales under paragraphs (E) and (G) (variable net profit and work commitment) to be in place before the 1981 sales, in order to give a fair test of those bidding methods through actual use (App. A, *infra*, 48a). Accordingly, the court ordered that those regulations should "to the maximum extent feasible", be promulgated by mid-1981, and before any further lease sales (App. A, *infra*, 50a).

In a final footnote, the court of appeals found standing in the respondents as consumers and as

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[9] The court ordered the Secretary of Energy to promulgate regulations governing the variable net profit and work commitment alternatives identified in paragraphs (E) and (G). App. A, *infra*, 50a. Parts of the opinion, however, suggest that the Secretary has an obligation to promulgate regulations covering *each* of the alternative bidding systems (App. A, *infra*, 35a, 38a, 46a). The scope of the Secretary of the Interior's obligation to experiment with the alternative systems is at least equally unclear. Compare App. A, *infra*, 38a, 40a-41a, 49a (obligation to test all) with 29a, 31a, 38a, 48a n.96, 49a (semble) (obligation to test non-cash bonus alternatives) and 38a, 41a-46a, 47a (obligation to test variable net profit share). See also App. A, *infra*, 47a n.95.

competitors.[10] The court found that the California governmental respondents had alleged a "concrete and tangible" economic injury (App. A, *infra*, 52a n.*)[11] and that the consumer respondents had alleged sufficient economic harm to have standing on that basis (*id.* at 52a-53a n.*).[12]

REASONS FOR GRANTING THE PETITION

In total disregard of the plain language of the statute, the court below has imposed substantial, but ill-defined, burdens on the Secretaries of Energy and the Interior. Those burdens and the uncertainty concerning their scope will seriously impede efforts to achieve the statutory goal of rapid, efficient, and orderly development of the nation's OCS oil and gas resources.

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[10] Respondents also asserted standing as taxpayers and citizens, on the theory that the government's failure to implement all the bidding methods in Section 8(a)(1) injured them in that the national treasury did not receive enough money for the resources (J.A. 70-71).

[11] The California State Lands Commission and the City of Long Beach alleged that their ability to lease their undeveloped oil and gas lands was threatened by the federal leasing project's "generous" terms (J.A. 71-72). They also claimed, in a letter filed in the district court (J.A. 102-103), that they were harmed in "drainage" situations: where a pool of oil or gas crosses the line separating state ownership from federal ownership. In such a situation, they claimed that they would receive insufficient payment for their share of pooled resources because of the low payments received by the federal government under its leases. No specific drainage situation, however, was identified.

[12] As consumers, respondents claimed that they were harmed because only large businesses could afford bidding systems using large cash bonuses and as a result there was less competition under those systems; the decreased competition, they reasoned, caused them to pay more for gas and oil they consumed than they would otherwise have to pay (J.A. 70, 79-80).

1. The decision of the court below requires the Secretary of Energy to promulgate regulations for, and the Secretary of the Interior to utilize, certain bidding systems, even if those systems have been determined to be inconsistent with the purposes of the Act. Thus, the Secretaries may not rely on computer-modeling, statistical projections, or similar studies to determine which of the specified experimental alternatives merit testing by actual leasing. This limitation on the exercise of their discretion not only requires the expenditure of needless administrative effort; it also may impede the efficient development of the OCS oil and gas reserves, because the lease terms have a significant effect on the exploration, development and production of OCS oil and gas.[13] Moreover, because leases under the OCS Lands Act are for substantial periods,[14] the adverse effects—both on the amount of oil and gas recovered and on federal revenues received—of the required testing of inferior bidding systems will be enduring.

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[13] For example, a lease reserving an unduly high profit share to the lessor is likely to discourage exploration, by reducing the incentive of the producer, and encourage excessive expenditures for pre-production costs, in order to reduce the size of the "profit". Moreover, an excessively high federal profit share may well lead to premature abandonment of marginally productive wells, or discourage development of marginally productive reservoirs altogether. A lease with an excessively high "work commitment"—*i.e.*, a commitment to develop the site—encourages uneconomical drilling, and the diversion of drilling resources from better prospects at other sites.

[14] Leases are issued for an initial period of 5 years—or up to 10 years if necessary to encourage exploration and development in adverse conditions—and as long thereafter as oil or gas is produced in paying quantities or approved drilling or well reworking operations are conducted (43 U.S.C. (Supp. II) 1337 (b)). Lease terms therefore may well extend for 30 years or more.

2. In light of the close relation between the bidding systems and the efficient development of the OCS oil and gas resources, Congress was careful to preserve to the responsible officials the discretion to select the particular bidding systems most likely to effectuate the Act's purposes. The text of the relevant portion of the OCS Lands Act is clear: Section 8(a)(1) provides that "at the discretion of the Secretary [of the Interior]" the bidding may be based on any of the methods set out in paragraphs (A) through (H) of that subsection. Furthermore, the Act contains one precise constraint on that discretion. Under Section 8(a)(5)(B), the Secretary is required to use methods other than the one described in paragraph (A) (the cash bonus bid-fixed royalty method) for between 20 and 60% of the total area offered for leasing in the five-year period beginning September 18, 1978.[15] In meeting that obligation, he is free to use any of the methods set out in paragraphs (B) through (H).[16] Indeed, Congress was careful to provide that even this narrow limitation on the Secretary's discretion would not apply if the Secretary determines the limitations are inconsistent with the purposes and policies of the OCS Lands Act (43 U.S.C. (Supp. II) 1337(a)(5)(B)). Moreover,

[15] In the 11 lease sales held since that date, 49% of the tracts offered have used systems other than the cash bonus bid-fixed royalty system. The experimental systems have included a fixed profit share bidding system and a bonus bidding system with an increased fixed royalty. Both of these systems have the effect of reducing the size of the front end bonus.

[16] If he wishes to rely on paragraph (H), a "catch-all" paragraph for methods not otherwise authorized, he must submit the proposed system to Congress, which may exercise a congressional veto (42 U.S.C. (Supp. II) 1337(a)(4)(A)).

43 U.S.C. (Supp. II) 1337(a)(9)(D), requiring a report to Congress explaining why "a particular bidding system has not been or will not be utilized" is inconsistent with a statutory requirement that all, or any, particular system must be utilized. In sum, the statute simply cannot reasonably be read as requiring either the Secretary of Energy to promulgate regulations for all the bidding systems identified in Section 8(a)(1), or the Secretary of the Interior to utilize them. Nor can it be read as requiring the issuance of regulations for and the use of any particular alternative.[17]

The court below avoided addressing the clear statutory language by focusing on the legislative history indicating that the Secretary of the Interior is to experiment with the various bidding methods in order to determine which methods might be used to best satisfy the purposes of the Act. Much of the legislative history loosely describes the methods available for experimention, but it does not unequivocally state that the Secretary has a duty to make use of *each* enumerated method, or of any particular one. To the extent that the legislative history does address the issue of what sort of experimentation must take place, it is consistent with the plain language of the Act. It shows that Congress intended to require the Secretary to experiment with alternatives to the traditional 16⅔% royalty-cash bonus bid leasing methods, in order to reduce the large front end payments and assure greater federal par-

[17] Section 8(a)(1) makes no distinction between the alternative systems. There is accordingly no statutory basis for the court below's identification of "major" or "significant" alternatives (App. A, *infra*, 34a, 48a n.96, 49a). Moreover, the addition of a "catch-all" category on the same basis as the other alternatives is strong evidence that none was intended to be mandatory.

ticipation in the continuing revenues from oil and gas discoveries. (See, *e.g.*, H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 54, 140 (1977); S. Rep. No. 95-284, 95th Cong., 1st Sess. 110, 146, 155 (1977); H.R. Rep. No. 95-1474, 95th Cong., 2d Sess. 47 (1978)).[18] Thus, Congress identified several alternatives, including the new cash bonus bidding systems described in paragraphs (C), (D), and (F), that would reduce the size of the front end bonuses. H.R. Rep. No. 95-590, *supra*, at 139. The duty to experiment is spelled out in 42 U.S.C. (Supp. II) 1337 (a)(5)(B), requiring the use of alternative systems in between 20% and 60% of lease sales during the experimental period. Neither that Section, nor the legislative history which led to its enactment, imposes any more stringent requirement.

3. Although the court below imposed obligations on the Secretaries that go beyond those contained in the OCS Lands Act, the extent of those additional obligations is unclear. Respondents agreed on remand to the entry of an order requiring only that the Secretary of Energy promulgate regulations concerning the variable net profit share and work commitment systerms; they also agreed to a stipulation that the Secretary of the Interior undertake good faith experimentation with the variable net profit share system (see 43 U.S.C. 1337(a)(1)(E) and (G)).[19] The

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[18] This general dissatisfaction with sole reliance on the traditional leasing system, coupled with the belief that a variety of alternatives should be considered, explains the legislative history's frequent imprecision in describing the alternatives to be tried. For example, there are many references to net profit share bidding systems, without distinguishing between fixed and variable net profit share systems (App. A, *infra*, 17a). This imprecision does not suggest a congressional intent to require a specific system.

[19] The stipulation concerning the Secretary of Interior was contingent on the government's decision not to file a petition

court of appeals' opinion in terms requires no more (App. A, *infra*, 47a n.95, 50a). But its analysis of the legislative history, as well as certain language in the opinion (see note 9, *supra*), could also support broader obligations—to issue regulations concerning *all* the specified alternatives, and to use either both specified non-cash bonus bidding systems, or even all the specified alternatives. Moreover, even if the Secretary need only utilize the variable net profit share bidding system, it is far from clear how many leases must be offered under this system in order to satisfy the court-imposed requirement of "meaningful experimentation" (App. A, *infra*, 47a, cf. 38a).[20]

These uncertainties concerning the responsibilities of the Secretaries under the Act can be expected to lead to considerable further litigation, with concomitant delays and disruptions in the orderly development of our OCS oil and gas reserves. Such a result is inconsistent with "[t]he basic purpose of [the OCS Amendments, which] is to promote the swift, orderly, and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf." S. Rep. No. 95-590, *supra*, at 53; cf. App. D, *infra*, 96a.

4. The potential for further disruptive litigation is substantially increased by the court's expansive

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for certiorari, and, accordingly, never became effective. It does, however, reflect the parties' interpretation of the court of appeals' mandate.

[20] In addition, although the court of appeals and the parties have assumed that each paragraph of 43 U.S.C. (Supp. II) 1337(a)(1) describes a precise and discrete bidding system, in fact some of those paragraphs, including paragraph (G), contain more than one bidding system variation. Thus, it is not clear what would constitute a sufficient exercise by the Secretaries of the responsibilities assigned to them by the court of appeals with regard to each type of system.

finding concerning standing. Under that ruling, respondents have standing "in their capacity as representatives of consumers of the oil produced on the OCS" (App. A, *infra*, 52a n.*). If any representative of a consumer of oil and gas may challenge the Secretaries' bidding system evaluations, the courts are open to suits by a host of groups anxious to prevent leasing under *any* scheme.

This Court's decisions do not support such an expansive reading of the standing doctrine. Instead, this Court has held that in order to have standing, the plaintiffs must allege a "distinct and palpable injury." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). They must also show that there is a "fairly traceable" causal connection between the claimed injury and the challenged conduct, *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977), so that if the relief sought is granted, the injury will be redressed. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-45 (1976).

No such showing has been made here. As consumers, respondents claim that if alternative bidding methods were used, competition for the leases would be increased, resulting in lower oil and gas prices to consumers.[21] But the price of gas and oil is controlled by so many factors of worldwide scale, and the possible influence of bidding methods used by the federal government on the price of oil is so small,[22] that it is impossible to predict any detectable change in the

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[21] This argument is not easily compatible with respondent's alternative standing argument that the federal lease terms currently being offered are so favorable to producers that the competing state lessors are injured.

[22] Federal OCS leases currently provide 12% of domestic oil production and 27% of domestic gas production. Between 40 and 50% of the oil we consume is imported.

price of oil and gas to consumers even assuming that the alternative systems are preferable.[23]

Analogous claims under the antitrust laws alleging similarly tenuous anticompetitive effects have been denied for lack of standing. See, *e.g.*, *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495, 500 (9th Cir. 1977); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183, 197 (2d Cir. 1970); *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1132 (5th Cir. 1975). Cf. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979) (consumers of hearing aids complained of a price-fixing conspiracy involving hearing aid manufacturers).[24] There is no reason to believe that the OCS Lands Act was intended to grant a cause of action for anticompetitive harm to a broader class of plaintiffs than were the statutes directly aimed at anticompetitive practices.[25]

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[23] If payments to the government for leases are regarded as costs to be recovered in prices charged for crude oil and natural gas from those leaseholds, any increase in such payments would tend to increase, rather than decrease, consumer prices.

[24] The other cases cited by the court of appeals to support "consumer" standing (App. A, *infra*, 52a-53a n.*) were brought by consumer groups to complain of Department of Energy or Federal Power Commission price increases for oil and gas producers, plainly situations where a clear, immediate and direct relationship existed between the challenged action and the impact on consumers.

[25] *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), also cited by the court of appeals (App. A, *infra*, 52a n.*), involved environmental issues rather than economic ones. This Court found, on the basis of detailed findings by the lower court, a causal relationship between the challenged construction of a nuclear power plant and the violations of the laws respondents alleged.

Similarly, there is no sufficient showing of any causal connection between the claimed harm to the California governmental entities and the challenged federal bidding practices. The complaint wholly fails to allege any specific state leasing activities carried on or to be carried on in the future, which will be harmed at all by the government's OCS leasing program. Nor does the possibility that "drainage" situations might arise confer standing on respondents (note 11, *supra*). Respondents have pointed to no specific "drainage" problem involving them that may be affected by OCS Lands Act leases. Even if there are such problems, the state interests in a "fair and equitable" share of the proceeds are amply protected by 43 U.S.C. (Supp. II) 1337(g)(2).[26]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1981

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[26] That Section requires the Secretary to offer the Governor of any affected State an agreement contemplating the "fair and equitable" division of the revenues generated. If the parties cannot agree on the terms of the agreement, the dispute is to be referred to a federal district court.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2127

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL., APPELLANTS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 79-1633)

Argued September 26, 1980

Decided October 30, 1980

Before: ROBINSON and WALD, *Circuit Judges;* and HAROLD GREENE,* *United States District Judge* for the District of Columbia

Opinion for the Court filed by *Circuit Judge* WALD

WALD, *Circuit Judge*:

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

I. INTRODUCTION

For a second time in this case we are asked to determine whether the bidding systems employed by the Secretary of the Interior in leasing government offshore properties for oil and natural gas development comply with the Outer Continental Shelf Lands Act as substantially amended in 1978 ("OCSLA" or "the Act").[1] In an earlier decision this court found that the bidding systems utilized by the Secretary at that time did not contravene "the letter of the law."[2] We noted, however, that the time might come when the Secretary's continued failure to use the panoply of experimental bidding systems authorized by the Act would amount to an abuse of discretion.[3] Now we decide that, given the absence of significant progress toward experimenting with critical alternatives to front end cash bonus bidding systems since our prior decision, the day has arrived when the Secretary's continued delay is unreasonable and frustrates the essential purposes of OCSLA.

The present appeal challenges the district court's denial of appellants' motion for partial summary judgment, and in the alternative, motion for a preliminary injunction. Having heard argument on the appeal on an expedited basis, as required by statute,[4] this court affirmed the district court's refusal to enjoin the three lease sales scheduled for the fall of

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[1] 43 U.S.C.A. 1331 *et seq.*

[2] Energy Action Educational Foundation v. Andrus, Nos. 79-1768 and 79-1787 (D.C. Cir., Dec. 20, 1979).

[3] *Id.* slip op. at 21; conc. op. at 2.

[4] 43 U.S.C.A. § 1349(d).

1980 in an order dated September 29, 1980.[5] This opinion addresses the remaining aspects of the appeal not disposed of by the September 29, 1980 order.

II. BACKGROUND

We revisit a controversy initially ruled upon by this court almost a year ago. The parties now before the court are the same as they were then: Plaintiff-Appellants are seven consumer and two labor organizations, three private citizen-taxpayers, and two California governmental entities.[6] The Defendant-

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[5] Lease sales were scheduled for September 30, October 21, and an unspecified date in November, 1980. While we upheld the district court's refusal to enjoin these three imminent sales, we conclude for reasons discussed more fully below, that injunctive relief may not be inappropriate with respect to later sales. With the continued passage of time since the enactment of the 1978 OCSLA Amendments the appraisal will vary of appellants' likelihood of success on the merits, their irreparable injury, the balance of equities and the public interest. Washington metropolitan Area Transit Co. v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977). These tests for injunctive relief increasingly tip in appellants' favor, as the number of sales that have been held without experimentation with OCSLA non-cash bonus bidding alternatives grows. In addition, since the currently scheduled future sales are several months hence, pre-sale preparations will be less finalized at this time so that requiring implementation of the alternative bidding systems before future sales take place should be more feasible and less disruptive than in the case of the three sales scheduled for the fall of 1980.

[6] The fourteen appellants are: Energy Action Educational Foundation; Consumer Federation of America; Consumer Energy Council of America; Michigan Citizens Lobby; Arkansas Consumer Research, Inc.; Service Employees International Union; International Association of Machinists;

Appelles are the Secretaries of the Interior and Energy, and the United States. Appellants' complaint, filed over a year ago, claimed that the Secretary of Energy failed to issue regulations for all the bidding systems set out in OCSLA, and that the sale of Outer Continental Shelf ("OCS") leases in the absence of those regulations violated OCSLA.[7] Appellants also

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Citizen/Labor Energy Coalition; Texas Consumer Association; M. James Doling; Paul Casagrande; Kathleen F. O'Reilly; California State Lands Commission; and the City of Long Beach, California.

[7] Complaint, ¶¶ 133-143, J.A. 1, 73-76. (Joint Appendix citations, "J.A." refer to the Joint Appendix prepared for the first appeal of this case in Nos. 79-1768 and 79-1787.)

Section 8(a)(1) of OCSLA, 43 U.S.C.A. § 1337(a)(1), sets out the permissible alternative bidding systems and reads as follows:

> (a)(1) The Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease on submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of subsection (a) of section 1335 of this title. Such regulations may provide for the deposit of cash bids in an interest-bearing account until the Secretary announces his decision on whether to accept the bids, with the interest earned thereon to be paid to the Treasury as to bids that are accepted and to the unsuccessful bidders as to bids that are rejected. The bidding shall be by sealed bid and, at the discretion of the Secretary, on the basis of—
>
> (A) cash bonus bid with a royalty at not less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold;
>
> (B) variable royalty bid based on a per centum in amount or value of the production

saved, removed, or sold, with either a fixed work commitment based on dollar amount for exploration or a fixed cash bonus as determined by the Secretary, or both;

(C) cash bonus bid, or work commitment bid based on a dollar amount for exploration with a fixed cash bonus, and a diminishing or sliding royalty based on such formulae as the Secretary shall determine as equitable to encourage continued production from the lease area as resources diminish, but not less than 12½ per centum at the beginning of the lease period in amount or value of the production saved, removed, or sold;

(D) cash bonus bid with a fixed share of the net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(E) fixed cash bonus with the net profit share reserved as the bid variable;

(F) cash bonus bid with a royalty at no less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold and a fixed per centum share of net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(G) work commitment bid based on a dollar amount for exploration with a fixed cash bonus and a fixed royalty in amount or value of the production saved, removed, or sold; or

(H) subject to the requirements of paragraph (4) of this subsection, any modification of bidding systems authorized in subparagraphs (A) through (G), or any other systems of bid variables, terms, and conditions which the Secretary determines to be useful to accomplish the purposes and policies of this subchapter, except that no such bidding system or modification shall have more than one bid variable.

claimed that the Secretary of Interior's use of the cash bonus-fixed royalty bidding system, both before and after the 1978 Amendments to OCSLA, amounts to an abuse of discretion.[8]

The case first came before this court upon appellants challenge to the district court's two orders denying appellants' motions for preliminary injunctive relief to stop further lease sales. In an opinion authored by the late Judge Leventhal this court affirmed the district court's rulings.

Judge Leventhal's analysis began with a review of the history of the federal statutes enacted to provide for the development of offshore land on the "Outer Continental Shelf."[9] A reprise of this legislative background is appropriate before analyzing our prior opinion.

The 1978 OCSLA Amendments

OCSLA, originally enacted in 1953, was the first federal statute to regulate the development of OCS oil and gas resources.[10] Since that time the federal government has been actively engaged in leasing OCS lands.[11] Before its amendment in 1978 the Act speci-

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[8] Complaint, ¶¶ 144-158, J.A. 1, 77-83 (Contending *inter alia* that cash bonus bidding did not yield fair market value. *See* p. 12 *infra*.)

[9] The term "Outer Continental Shelf" has been defined by Congress to include all submerged lands lying seaward and three miles outside State waters, "and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a).

[10] 67 Stat. 462, 43 U.S.C. § 1331 *et seq.*

[11] As of the date the present appeal was argued, 52 sales of oil and gas leases have taken place on the OCS, resulting in the issuance of 3701 leases. Those leases currently yield nine

fied two alternative formats for lease bidding. The Secretary was directed to conduct competitive bidding by sealed bids either (1) on the basis of a cash bonus bid with a fixed royalty (fixed at no less than 12½ percent of the gross revenue of the lease), or (2) by a royalty rate bid with a fixed cash bonus payment.[12] Prior to 1978 virtually all of the OCS lease sales were transacted by the cash bonus-fixed royalty method with the royalty set in advance of bidding at 16-⅔ percent (one-sixth) of the gross value of production.[13] Under that system, a lease would be

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percent of domestic oil production and 24 percent of domestic gas production. After our order of September 29, 1980 a sale occurred on September 30, 1980; two more sales are scheduled for the remainder of 1980.

[12] 43 U.S.C. § 1337(a) (1976).

[13] There were, however, sales conducted by other methods. Some tracts were offered for lease sales on the basis of royalty bidding with a fixed cash bonus at OCS lease sales 36 (Santa Barbara Channel) and CI (Cook Inlet, Alaska) held on October 16, 1974 and October 27, 1977, respectively. At those two sales a total of 56 tracts were offered with royalty bidding and 38 received bids.

At nine sales in 1978 and 1979 some tracts were offered on the basis of bonus bidding with fixed sliding scale royalty. Under that system the Secretary initially sets a royalty schedule under which the lessee is required to pay a percentage which increases to as much as 60 percent as the value of production increases. The leases are awarded to the bidders which submit the highest acceptable cash bid for a particular tract. Brief for Appellants at 4, Energy Action Educational Foundation v. Andrus, No. 80-2127 (D.C. Cir., argued Sept. 26, 1980) [hereinafter "Brief for Appellants"].

In lease sale No. 35 off the coast of Southern California in December 1975, tracts were offered under a cash bonus system with fixed royalty doubled from the traditional 16⅔ percent to 33⅓ percent. H.R. Rep. No. 1835, 95th Cong., 2d Sess. 14-15 (Jan. 2, 1979). For a description of post-1978 bidding *see* pp. 11-12 *infra*.

awarded to the qualified bidder with the highest cash bid deemed acceptable to the Secretary on a particular tract.

With the exception of one minor amendment,[14] the original version of OCSLA remained untouched until 1978.[15] By the mid-1970's, however, several cross-

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[14] The Deepwater Port Act, January 3, 1975, Public Law 93-627, Sec. 19(f), 88 Stat. 2146, required the State laws applicable to OCS activities to be continually updated. *See* 43 U.S.C. § 1333, as amended (1976).

[15] Other statutes that affected OCS operations were passed during that period:

Fish and Wildlife Act of 1956 (Act of August 8, 1956, 70 Stat. 1119 as amended, 16 U.S.C. 742(a), et seq.)—Establishes the U.S. Fish and Wildlife Service to study, protect and manage the fish resources under U.S. jurisdiction.

Geneva Conventions of 1958 (Convention on the Territorial Sea and the Contiguous Zone. U.N. Doc. A/Conf. 13/L.52 T.I.A.S. 5639; Convention on the Continental Shelf, U.N. Doc. A/Conf. 13/L.55. T.I.A.S. 5578.)—Provides for a territorial sea of 3 miles, a contiguous zone up to 12 miles, and a continental shelf "to a depth of 200 meters or . . . to where the depth . . . admits to exploration . . ."

Natural Gas Pipeline Safety Act of 1968 (Public Law 90-481, 82 Stat. 720, 49 U.S.C. 1071 et seq.)—Establishes requirements for the placing of pipelines.

National Environmental Policy Act of 1969 (Public Law 91-190, 83 Stat. 854, 42 U.S.C. 4321 et seq.)—Provides requirements through regulations for draft environmental impact statements, hearings, and final environmental impact statements as to areas of leasing and actual leases.

Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590, 29 U.S.C. 651 et seq.)—Requires employers, including those engaged in OCS development activities, to provide a safe working environment for all employees.

Federal Water Pollution Control Amendments of 1972 (Public Law 92-500, 86 Stat. 816, 33 U.S.C. 1251 et

currents generated support for revising OCSLA.[16] The onset of the energy crisis, dramatized by the oil embargo of 1973, heightened the attractiveness of the uncertain OCS resources to those concerned with reducing this country's dependence on foreign oil supplies.[17] At the same time, local governments, environmental and citizen organizations, commercial and recreational fishing interests, and other groups expressed increasing concern over possible deleterious effects of rapid OCS development. They sought a greater voice in developing and regulating future OCS ventures.[18]

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seq.)—Limits and controls the discharge of oil or hazardous substances into or upon the navigable waters.

Marine Protection, Research and Sanctuaries Act of 1972 (Public Law 92-522, 86 Stat. 1028-1046) 16 U.S.C. 1361, 1362, 1371-84, 1401-7.)—Authorizes the designation of marine sanctuaries which may extend to the outer limit of the Continental Shelf.

Coastal Zone Management Act of 1972 (Public Law 89-545, as added Public Law 92-583, 86 Stat. 1281. 16 U.S.C. 1451 et seq.)—Provides Federal assistance to coastal States to enable them to develop and administer their own coastal management programs.

Deepwater Port Act of 1974 (Public Law 93-627. 88 Stat. 2146. 33 U.S.C. 1501 et seq.)—Provides for the regulation of the location, ownership, construction, and operation of deepwater ports beyond the territorial limits of the United States.

[16] *See generally* H.R. Rep. No. 96-1214, 96th Cong., 2d Sess. 5-6 (1980); H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 74-94 (1977).

[17] *Id.*; *see also* S. Rep. No. 95-284, 95th Cong., 1st Sess. 60-68 (1977).

[18] H.R. Rep. No. 96-1214, *supra* note 16, at 5-6; H.R. Rep. No. 95-1835, *supra* note 13, at 6-7; H.R. Rep. No. 95-590, *supra* note 16, at 74-94.

Some of these interest groups focused attention on inadequacies of the existing bidding system specified by OCSLA. In light of skyrocketing fuel prices it was asserted that the prevalent cash bonus-fixed royalty method of bidding could not assure the government a fair return on its leases, because total royalties paid to the government were declining as a percentage of gross proceeds on wells. In addition, the necessity to make extremely high "front end" cash bonus payments in order to participate in the lease sales coupled with the high risk associated with developing some OCS lots had the anticompetitive effect of limiting participation in the lease sales to only the largest concerns.[19]

Congress responded to the competing concerns for acceleration of OCS development, environmental protection, and involvement of all inherent parties in OCS development by enacting the OCSLA Amendments of 1978. With regard to lease sale bidding procedures, Congress expressly retained the two bidding systems previously authorized, but added five other specific alternatives as well as any nonenumerated bidding method the Secretary of the Interior determines to be useful to accomplish the purposes and policies of the Amendments.[20] The Secretary is required to use the enumerated alternatives to the cash bonus-fixed royalty method for not less than 20 percent but not more than 60 percent of all acreage offered for leasing each year during a five year ex-

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[19] H.R. Rep. No. 96-1214, *supra* note 16, at 14; H.R. Rep. No. 95-590, *supra* note 16, at 54, 94, 103; S. Rep. No. 95-284, *supra* note 17, at 46-47.

[20] 43 U.S.C.A. § 1337(a)(1). *See* text of alternative bidding provisions, note 7, *supra*.

perimentation period specified by the statute.[21] In addition, although the Act provides that lease sales are to be conducted by the Secretary of the Interior, it is the Secretary of Energy who, in consultation with the Secretary of the Interior, must promulgate regulations governing the use of alternative authorized options.[22] The Secretary of Energy must report to Congress annually concerning the use and nonuse of the alternative bidding options.[23] The Secretary of the Interior must also evaluate the competitive impacts of the use and nonuse of bidding options in an annual report to Congress, as well as reporting

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[21] 43 U.S.C.A. §§ 1337(a)(1), (a)(5)(B). The five year period began on September 18, 1978. The percentage limitations apply "unless the Secretary determines that the (percentages) are inconsistent with the purposes and policies of the Amendments." 42 U.S.C.A.1 § 1337(a)(5)(B). This last provision is referred to as an "escape hatch" in S. Rep. 95-284, *supra* note 17, at 73; H.R. Rep. No. 95-590, *supra* note 16, at 139.

[22] Under Section 302(b)(2) of the Department of Energy Organization Act, 91 Stat. 578, 42 U.S.C. § 7101 *et seq.*, the responsibility of the Secretary of the Interior to promulgate regulations implementing OCS alternative bidding systems was transferred to the Secretary of Energy. 42 U.S.C.A. § 7152(b)(2). *See* H.R. Rep. No. 95-1474, 95th Cong., 2d Sess. 77-78, 90 (1978) (Conference Report). If the Energy Secretary wishes to promulgate regulations for systems which are not described in Section 8(a)(1)(A)—(G) but instead proceeds under Section 8(a)(1)(H) (*see* note 7 *supra*) he must report the proposed system to Congress. The new system may not be used if either House passes a resolution of disapproval within 30 days. Section 8(a)(4), 43 U.S.C.A. § 1337(a)(4).

[23] 43 U.S.C.A. § 1337(a)(9).

before each lease sale of the planned use of particular bidding systems.[24] Finally, the Secretary of Interior is required to prepare and maintain a comprehensive oil and gas leasing program to implement the different policies of the Act.[25] That program must adhere to general principles spelled out in the statute, including a balanced consideration of economic, social, and environmental concerns and the assurance of a fair market value on leased land to the government.[26]

This Court's Prior Decision

Three OCS lease sales were held between the September 18, 1978 effective date of the OCSLA Amendments and the June 22, 1979 filing date of appellants' lawsuit. In each instance the Secretary of the Interior chose cash bonus-fixed royalty bidding for part of the tracts to be leased, while using another bidding system—a cash bonus system with a fixed non-linear (semi-logarithmic) sliding scale royalty[27]—for the other tracts. The Secretary planned to use the same mix of bidding systems in four more lease sales that were scheduled to occur between June and November 1979.

Appellants' suit challenged the Secretary of the Interior's continued use of the cash bonus-fixed royalty bidding system. Judge Leventhal described the thrust of the litigation:

> The essence of appellant's complaint is that cash bonus-fixed royalty bidding, particularly with the

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[24] *Id.* §§ 1337(a)(8), 1343(2).

[25] *Id.* § 1344.

[26] *Id.* § 1344(a)(1).

[27] *See* note 13 *supra.*

> royalty fixed at 16⅔%, cannot yield fair market value nor generate adequate competition as mandated by the amended OCS Act. Only through the issuance and use of regulations authorizing alternative systems, most notably the profit-sharing options, can the government achieve the statutory objectives. However, according to appellant, issuance of those regulations has been unduly delayed by a "jurisdictional squabble" between the Departments of Energy and the Interior.[28]

Appellants sought declaratory and injunctive relief leading to the suspension of all OCS leasing until the Secretary of Energy promulgated regulations governing the use of all of the alternative bidding systems authorized by OCSLA. In particular, appellants' objective was the promulgation of regulations for bidding incorporating net profit sharing. Appellants also sought an injunction against any further leasing under the cash bonus-fixed (16⅔ percent) royalty method as well as an investigation of existing leases with appropriate remedial action if it was demonstrated that the then existing leases would not return a fair yield to the government.

Before the first of the four planned 1979 lease sales appellants moved for a preliminary injunction to prevent any further sales "in the absence of regulations establishing the full range of bid systems mandated by [OCSLA]." The district court denied the motion ruling that appellants had failed to show a likelihood of success in prevailing on the merits.[29]

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[28] Energy Action Educational Foundation v. Andrus, *supra* note 2 [hereinafter "Energy Action"], slip op. at 8.

[29] Energy Action Educational Foundation v. Andrus, 479 F. Supp. 62 (D.D.C. 1979); (order denying preliminary injunction per Aubrey E. Robinson, Jr., District Judge, J.A. 293).

Appellants did not appeal this ruling, but rather, moved for modification of the order so as to enjoin the award of leases in the first scheduled sale on the basis of cash bonus-fixed royalty bidding. After bids were opened for the June 1979 sale, appellants renewed their motion for a modification, arguing that the actual bidding results contravened the Act. This motion was denied by the district court on the basis that appellants had "still failed to show that utiliaztion of the cash bonus-fixed bidding system with a 16⅔ percent fixed royalty violates" OCSLA.[30]

On appeal this court refused to grant preliminary injunctive relief. In announcing this result the court carefully limited the scope of the issue deciding to "whether the continued partial use of cash bonus-fixed royalty bidding—*as planned for the near future by the Secretary*—violates the statutory scheme." [31] (emphasis supplied). On the basis of the record at that point in the litigation the court would not say that the government's leasing activities violated the legislative scheme.[32] The opinion emphasized that while Congress anticipated the continued "substantial" use of the traditional cash bonus-fixed royalty form of bidding, "Congress [also] sought experimentation among bidding systems, usually through direct comparisons between cash bonus-fixed royalty bidding and other options, in order to obtain reliable information as to the relative advantages and disadvantages of the enumerated systems. It was hoped

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[30] Civ. No. 79-1633 (D.D.C., July 17, 1979) (order denying motion for modification per Aubrey E. Robinson, Jr., District Judge); J.A. 549.

[31] Energy Action, slip op. at 11.

[32] *Id.* at 19, 21.

that this testing would ultimately enable the Secretary to utilize the system or mix of options which emerged as superior." [33]

A reasonable timetable for achieving this mix of options was suggested in the opinion. Judge Leventhal referred to the House Committee Report's "disapproval" of the possibility that the new regulations would take up to two years to issue.[34] The opinion also noted a June 1979 GAO Report recommending that alternative bidding systems be issued "no later than January 1, 1980." Further, the opinion recognized that Congress had provided flexibility in scheduling deadlines for compliance with the 1978 Amendments. For example, the amended Act requires the preparation of a comprehensive five year oil and gas leasing program.[35] The Act provides that either after approval of that plan by the Secretary, or in any event no later than March 1980 (eighteen months following the September, 1978 effective date of the 1978 Amendments), no leases were to be issued un-

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[33] *Id.* at 13. The opinion cited to the Conference Report's language requiring "a fair selection of different methods on different tracts." H.R. Rep. No. 95-1474, *supra* note 22, at 92. *See also* H.R. Rep. No. 95-590, *supra* note 10, at 54; S. Rep. No. 95-284, *supra* note 17, at 47.

The bidding methods utilized or planned at the time of the opinion are discussed at pp. 11-12 *supra*. None of the completed or planned sales utilized the variable net profit share method specified in 43 U.S.C.A. § 1337(a)(1)(E). The subsequent development and use of regulations is discussed at pp. 17-20 *infra*.

[34] *See* H.R. Rep. No. 95-1835, *supra* note 13, at 25.

[35] 43 U.S.C.A. § 1344. The mandated comprehensive program had not been submitted at the time of the prior opinion, and was not ultimately submitted and approved until June, 1980.

less issued pursuant to the comprehensive plan. Nevertheless, Congress made it clear that leasing was to continue until the comprehensive leasing program became operation, both during the interim between enactment of the 1978 Amendments and the approval of the plan, and thereafter for so long as the plan was under judicial or administrative review.[36] The opinion concluded:

> Congress did not expect changes to take place overnight. To the contrary, it fully anticipated that an optimal comprehensive leasing plan took time—*as much as 18 months or longer*—to become operational. Accordingly, it drafted a detailed schedule for instituting the program, placing outside time limits on the completion of each stage.[37]

(emphasis supplied).

At the same time the opinion did recognize that the Secretary's leeway on timing was not boundless:

> [A]t some point in time the Secretary's delay in issuing profit-sharing regulations and in failing to experiment among alternative bidding systems more widely may constitute a violation of the OSC Act amendments.[38]

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[36] *Id.* § 1344(d)(3).

[37] Energy Action, slip op. at 16.

[38] *Id.* at 21. The opinion also implied, without deciding, that under some circumstances the government's failure to invoke the so-called "escape hatch" (*see* note 21 *supra*) to exceed the maximum limitations on the use of alternatives to cash-bonus bidding could amount to an abuse of discretion. *Id.* at 20. Support for this position is found in the Conference Committee Report which states:

> The Secretary of the Interior is given the discretion to waive the *minimum* or *maximum* requirement for the use

It merits interjecting at this point that both at the time of our earlier opinion and subsequently, the government's intentions and actual progress toward meeting a reasonable timetable for issuance of profit sharing regulations has been a source of some confusion. For example, proposed regulations dealing with profit sharing were said to be forthcoming imminently at the time of argument in the earlier case. When issued in December 1979 they dealt only with the cash bonus bidding-fixed net profit share option, option (D). But it is not at all clear whether the parties or even the court focused at the time of the earlier opinion on the fact that the forthcoming regulations were not to include variable net profit share bidding, option (E). It is also commonplace to find general references to net profit share bidding systems which do not distinguish between fixed and variable net profit options, in statements sprinkled throughout the legislative history and in the arguments of counsel and the prior opinion of this court,[39] as well as in appellees' reports to the Congress on its implementation plans as to OCSLA.[40] The fact is that neither

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of bidding systems other than bonus bidding, based on a determination that *either* the minimum or maximum percentage level is not consistent with the purposes and policies of the act.

H.R. Rep. No. 95-1474, *supra* note 22, at 93 (emphasis supplied).

[39] *See, e.g.*, Energy Action, slip op. at 11 n.29, which recites appellants' evidence offered to demonstrate the superiority of a profit-sharing bidding system over the cash bonus-fixed royalty option. Both the court's summary of the evidence, and the actual documents in the Joint Appendix refer to profit-sharing systems without specifying whether they mean *fixed* or *variable* systems.

[40] *See, e.g.*, H.R. Rep. No. 96-1214, *supra* note 16, at 49-50.

then nor now have there ever been proposed or final regulations for *variable* net profit share bidding.[41]

Subsequent Events

Since this court's earlier decisions, the Secretary of Energy has issued final regulations governing four of the seven alternative bidding schemes enumerated by OCSLA.[42] All of these four regulations, however, had been under consideration at the time of our prior decision.[43] Only one of the regulations involves a non-

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[41] The Department of Energy has "contracted" for an analysis of a bidding system with net profit share as a bidding component. Brief for Appellees at 8. Apparently this is what the district court referred to in asserting that the Department of Energy was in the process of preparing variable net profit share regulations. Civ. No. 79-1633 (D.D.C. July 17, 1980) (memorandum opinion denying motion for preliminary injunction per Norma Holloway Johnson, District Judge) [hereinafter "Mem. op."] at 7. *See* notes 47 & 50 *infra*.

[42] Final regulations for bidding systems authorized by 43 U.S.C.A. § 1337(a)(1)(A)-(C) (cash bonus bid-fixed royalty, royalty bid-fixed cash bonus, and cash bonus bid-fixed sliding scale royalty) were promulgated on February 12, 1980, 45 Fed. Reg. 9536. Final regulations for a cash bonus bid-fixed net profit share bidding system were promulgated on May 30, 1980 45 Fed. Reg. 36784.

[43] The previous experience with the three methods described in § 1337(a)(1)(A)-(C) is described at pp. 5-6, 11-12 *supra*. The fourth method, cash bonus bid-fixed net profit, had been proposed by the time of our previous decision and was the option that appellees were referring to when they stated to both Congress and the courts that regulations governing profit-sharing would be out "in the near future." *See O.C.S. Oversight of 1978 Amendments; Hearings Before the Select Committee on the O.C.S., House of Representatives*, 96th Cong., 2d Sess. [hereinafter *"Oversight Hearings"*] 493-95 (Dec. 4, 1979) ("Hearings on Promulgation of Bidding Sys-

front end cash bonus bidding system (royalty bid-fixed cash bonus option (B) and there is also unrefutable evidence on the record that appellees have now determined not to make further use of this option.[44] Indeed, the Department of Energy reported to Congress on the basis of its leasing experience in 1978 that the disadvantages of royalty bidding "are too high a price to pay for the lower cash bonuses and higher bonus participation rates expected under royalty bidding." [45]

As regards the other three untested statutory bidding systems—two of which do involve non-front end cash bonus alternatives—there has been no significant progress in issuing regulations since the prior decision of this court other than a preliminary "notice of inquiry" for comments on the development of work commitment bidding systems.[46] In particular, nothing

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tems Regulations"), *summarized in* H.R. Rep. 96-1214, *supra* note 16, at 49-50.

Appellants contend that even this fourth "new" method is not a real departure from past practice, but rather, "once again the cash bonus bidding system advantaging the biggest oil companies." Brief for Appellants at 6.

[44] Deposition of H. Theodore Heintz, Jr., Asst. Director of the Office of Policy Analysis, Department of the Interior, 334 (June 17, 1980), Energy Action Education Foundation v. Andrus, No. 79-1633 (D.D.C., Sept. 17, 1980) (Deposition filed July 15, 1980, Docket No. 59) [hereinafter "Heintz Deposition"].

[45] Department of Energy: *Report to Congress on Various Bidding Options Utilized in FY-78 Lease Sales on the OCS* 18, J.A. 232, 249.

[46] The three untested bidding systems are those specified by 43 U.S.C.A. §§ 1337(a)(1)(E)-(G). The Department of Energy issued a notice of inquiry and requested comments on the development of bidding systems with a work commitment

has been done as to the critical variable net profit share bidding system; the record shows only a representation by appellants that a "contract for analysis" (content and completion date unknown) was let out in the summer of 1980.[47]

Meanwhile, the comprehensive five year leasing plan as mandated by section 18 of the Act[48] has been approved and thirty six lease sales scheduled under its terms. Three such sales were scheduled for the end of 1980 and one of these occurred shortly after argument of the present appeal.[49] The next six sales are

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component authorized by 43 U.S.C.A. §§ 1337(a)(1)(B), (C) & (G) in a notice published July 25, 1980, 45 Fed. Reg. 49586.

[47] In a deposition taken in June, 1980, an Interior Department official admitted that no proposal for regulating net variable profit sharing bidding was expected any time soon. Heintz Deposition, *supra* note 44, at 111 (June 16, 1980). At argument appellees admitted that no regulations on variable net profit share bidding would issue this year or in the immediate future. Indeed, appellees conceded that there was no timetable for their issuance at all.

This is consistent with appellees' position that OCSLA does not require the promulgation of any specific bidding system, and that there is no statutory duty to issue all the regulations by any specific time. *E.g.*, Brief for Appellees at 20.

No timetable for promulgation of this regulation was reported to the House Select Committee on OCS Oversight in 1980. *Oversight Hearings, supra* note 43, at 1272 (May 15, 1980).

[48] 43 U.S.C.A. § 1344.

[49] Sale A62 in the Gulf of Mexico took place on September 30, 1980. That sale involved cash bonus bidding with a fixed 33½ percent royalty in 22 tracts, cash bonus bidding with a fixed sliding scale royalty on 59 tracts, cash bonus bidding with a fixed net profit share of 50 percent on 40 tracts, and

currently planned to be held in consecutive months beginning in May 1981. If appellees continue on their course, it seems evident that 1981 will pass, and with it over one-half of the five year statutory period for experimenting with bidding alternatives and over one-third of the five year comprehensive leasing program, with no experimentation with variable net profit share bidding. The prospects for expecting such experimentation are further dampened by appellees' refusal to recognize any statutory obligation to issue regulations on variable net profit share bidding by any specific time or indeed any time at all.[50]

III. Analysis

Before the trial court, both sides moved for summary judgment. Apellants sought partial summary judgment or, in the alternative, a preliminary injunction, on the grounds that the government was in

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cash bonus bidding with a fixed 16⅔ percent royalty on 71 tracts. 45 Fed. Reg. 55932 (Aug. 21, 1980).

Proposed sale notices have been issued for sale 55 in the Eastern Gulf of Alaska, 45 Fed. Reg. 37895 (June 5, 1980), scheduled for October 21, 1980, and sale 62 in the Gulf of Mexico, 45 Fed. Reg. 45872 (July 7, 1980), scheduled for November 1980.

For sale 55 the Secretary proposed cash bonus bidding with a fixed sliding-scale royalty on 32 tracts, cash bonus bidding with a fixed net profit share of 40 percent of 88 tracts, and cash bonus bidding with a 16⅔ percent royalty on the remaining 90 tracts.

For sale 62 the Secretary proposed cash bonus bidding with 33⅓ percent royalty on 11 tracts, cash bonus bidding with a fixed net profit share of 50 percent on 22 tracts, and cash bonus bidding with a 16⅔ percent royalty on 38 tracts.

[50] *See*, notes 41 & 47 *supra*. There appears to be no support for the district court's asserting that "defendants state that the Department of Energy is in the process of preparing regulations for the variable net profit share bidding system." Memo. op. at 7.

violation of the Act because it still had not developed regulations for all of the bidding systems as required by OCSLA. In turn, the government appellees moved for summary judgment; first on the ground that the Act did not require promulgating all of the authorized regulations before further lease sales took place, and, second, on the ground that the continued use of cash bonus-fixed royalty bidding did not amount to an abuse of discretion. In moving for judgment on the first issue the government relied on two independent arguments: (1) OCSLA does not require issuance of regulations for all or any particular bidding system(s), and (2) even if OCSLA imposes an obligation to issue regulations on all the specified bidding systems, appellees are proceeding at a reasonable pace toward fulfilling this duty.

After the case was reassigned,[51] the district judge denied all the motions for summary judgment and appellants' motion for a preliminary injunction. The articulated reason for the refusal to grant the summary judgment motions was that the court found a genuine factual issue existed as to whether OCSLA requires the issuance of regulations for all the enumerated bidding systems before further leasing activity can take place.[52] Since, along with both parties,[53] we

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[51] Following a May 16 status conference before Judge Robinson, the parties filed their motions. The case was then transferred to recently appointed District Judge Johnson.

[52] In denying appellants' motions the district court explicitly offered this reason, Mem. op. at 9, while in a separate order denying defendants' motion the court noted the existence of material facts in dispute generally, without explicitly identifying the nature of the factual disputes. Energy Action Educational Foundation v. Andrus, No. 1633 (D.D.C., Sept. 17, 1980) (order denying appellees' motion for summary judgment).

[53] Brief for Appellee at 16 n.9; Brief for Appellant at 24.

disagree with her conclusion that this is a factual issue which precludes granting summary judgment rather than a legal issue as to the Secretaries' obligations under OCSLA, we find it necessary as well as appropriate to construe OCSLA as it relates to the requirement to issue regulations on alternative bidding systems. Although cognizant of the absence of either a final judgment or certification pursuant to 28 U.S.C. § 1292(b) we nonetheless perceive no interests to be served by further delaying consideration of the basic statutory issue dominating this protracted litigation, a question of law which cannot be illuminated by the development of additional facts at trial. Reaching the critical legal issue now not only serves the interests of judicial economy, but provides essential guidance for the ongoing litigation upon remand.

We feel justified in reaching this issue in order to decide the appeal of the refusal to enjoin the 1981 lease sales, which was not disposed of by our order of September 29, 1980. There is no question that jurisdiction exists to decide issues related to the surviving portion of the appeal from the denial of the preliminary injunction.[54]

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[54] 28 U.S.C. 1292(a)(1). Courts, of course, are reluctant to consider the merits of the case on an appeal from an interlocutory order. *See, e.g.*, SEC v. Senex Corp., 534 F 2d 1240, 1241 (6th Cir. 1976); Industrial Bank of Washington v. Tobriner, 405 F.2d 1321, 1324 (D.C. Cir. 1968); Young v. Motion Pictures Ass'n, 299 F.2d 119, 121 (D.C. Cir. 1962). They undoubtedly have jurisdiction to do so, however, under section 1292(a)(1), E.P. Hinkle & Co., Inc. v. Manhattan Co., 506 F.2d 201, 204 (D.C. Cir. 1974):

> Review quite properly extends to all matters inextricably bound up with the remedial decision. . . . [T]he scope of

The basis for the district judge's denial of a preliminary injunction as reflected by her analysis of the likelihood that appellants would succeed on the merits, rested in substantial part on her view that OCSLA imposes no obligation on the Secretaries to issue regulations or to experiment with net profit share bidding so long as they "retreat from the sole and exclusive use of the cash bonus-fixed royalty bidding system and . . . develop and use other systems which promise to meet the goals and policies of the

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review may extend further to allow disposition of all matters appropriately raised by the record, including entry of final judgment. Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development.

16 Wright, Miller, Cooper & Gressman, Federal Practice and Procedure § 3921 at 17 (1977).

Thus the Supreme Court has allowed a court of appeals to consider a motion to dismiss that was denied by the district court, when the motion was associated with an appealable interlocutory order, Deckert v. Independence Shares Corp., 311 U.S. 282, 287 (1940); so long as the decision on the merits is clear, judicial economy is obviously served by issuing a decision that will terminate or expedite the litigation. *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 52-53 (1938); Smith v. Vulcan Iron Works, 165 U.S. 518, 525 (1897). Courts of appeals have similarly issued merits decisions to help guide the course of litigation on remand. Hagopian v. Knowlton, 470 F.2d 201, 207 (2d Cir. 1972), or entered judgment for the plaintiff when the record demonstrated the pointlessness of further argument below, Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67 (2d Cir.), *cert. denied*, 385 U.S. 971 (1966). The Court, however, must restrict its merits decisions to issues that are closely related to the interloctutory order on appeal. Ex Parte National Enameling & Stamping Co., 201 U.S. 156 (1906).

1978 Amendments." [55] Accordingly, we proceed with an interpretation of the relevant portions of OCSLA, as they relate to the Secretary's duty to issue regulations on alternative bidding systems, particularly the variable net profit option specified in section 8(a)(1)(E) of the Act.

OCSLA's Mandate to Experiment With Alternative Systems

The purpose of section 8 of OCSLA is clear. Section 8 mandates the Secretary of the Interior to experiment over a five year period with alternative systems for OCS lease sales other than front end cash bonus bidding. The objective of the required experimentation is to arrive at the optimal system or systems in order:

> (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition.[56]

To that end, the Secretary is authorized to utilize the seven specific bidding systems set out in section 8.[57] To further his experimental goals, he is also authorized to require bidders to bid under more than one system simultaneously "in order to obtain statis-

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[55] Mem. op. at 11.

[56] Section 102(2), 43 U.S.C.A. § 1802(2).

[57] *See* note 7 *supra.*

tical information to determine which bidding alternatives will best accomplish the purposes and policies of this subchapter." [58]

There is no issue as to the Secretaries' duty to experiment with alternative systems to traditional front end cash bonus bidding—the government terms it "uncontested" that the "Secretaries of Energy and Interior are obligated to experiment with alternative leasing systems to eventually determine the best possible approach to the development of gas and oil" in offshore reserves.[59] And indeed the legislative history of the Amendments is replete with assertions to that effect. For example, the House Committee Report states:

> The leases have [in the past] been awarded by auction, traditionally on the basis of cash bonus bids. With the present shortage of investment capital that will prevail for many years, increasing risks of uncertainty, and the increasing integration and concentration of energy industries, there is now doubt whether cash bonus bidding remains the best system for the future. One purpose of H.R. 1614 is to authorize alternative leasing arrangements and *require experimentation with them.* It will enable the Secretary of the Interior, who administers the federal leasing program, to strike a proper balance between securing a fair return to the Federal Government for the lease of its lands, increasing competition in exploitation of resources, and providing the

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[58] 43 U.S.C.A. § 1337(a)(5)(A).

[59] Brief for Appellees at 20.

> incentive of a fair profit to the oil companies, which must risk their investment capital.[60]

(emphasis supplied).

It was never in doubt that the purpose of section 8's authorization of the seven bidding options was to foster experimentation with a five year period with new alternatives to the traditional cash bonus-fixed royalty bidding system:

> The obvious intention of the committee in revising the procedures for use of new bidding systems is to determine what system or systems in what situations, provide the best means to lease

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[60] H.R. Rep. No. 95-590, *supra* note 16, at 54. Throughout consideration of the bill the Secretary of the Interior reiterated that "this Department is firmly committed to *substantial* use of bidding systems other than the existing cash bonus system." (emphasis supplied). *See, e.g.*, S. Rep. No. 95-284, *supra* note 17, at 155, 110, 146. (Letters from Secretary Andrus to Chairman Jackson); *see also id.* at 119 (Statement of John O'Leary, Administrator, Federal Energy Administration) ("I can assure you that under this Administration *a variety of new systems* will be used") (emphasis supplied). *But see* the post-enactment testimony at *Oversight Hearings*, *supra* note 43, at 580 (Feb. 6, 1980) (Statement of Dr. John Sawhill, Deputy Secretary, Department of Energy) ("I am not sure it is appropriate for us to issue regulations in every area. I don't think we should issue regulations just for the sake of issuing regulations. On the other hand, I do think we have to be more aggressive.") *and id.* at 1289 (May 15, 1980) (Statement of R. Dobie Lagenkamp, Deputy Asst. Secretary, Oil, Natural Gas and Shale Resources, Department of Energy) ("the congressional mandate is clear and I think in another year or so we may be able to pass some judgments on the alternative bidding systems. They are not going to be used universally. They are going to be used on an experimental basis.").

> our federal resources in the Outer Continental Shelf. Subsection (a) is intended to provide procedures to answer this question. . . . to *mandat[e] use of new systems, to insure they are tested and studied,* and to provide for random selection, to insure fair tests and studies, . . .[61]

(emphasis supplied). The Senate Committee Report was in accord that section 8's purpose was "to assure *that the new leasing systems would be tried.*" [62] (emphasis supplied).

The Conference Committee Report also stressed the obligation of the Secretary to test the new leasing systems. In rejecting a House provision that tracts utilizing different bidding systems be selected on a "random" basis, the Conference Report nonetheless admonished:

> Although there is no requirement for random selection, the Secretary, in setting forth systems for use on tracts, shall seek to secure a fair selection of different methods on different tracts. The purpose of such a selection is *to assure that adequate information is obtained as to relative advantages and disadvantages of the various bidding systems,* including the front-end bonus bid systems as applied to different types of tracts, having different expectations of the amount of hydrocarbon that can be recovered.[63]

(emphasis supplied).

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[61] H.R. Rep. No. 95-590, *supra* note 16, at 140. *Cf.* Minority Views, *id.* at 302-3 (objecting to the *mandatory* use of new bidding systems).

[62] S. Rep. 95-284, *supra* note 17, at 47, 73.

[63] H. Rep. No. 95-1474, *supra* note 22, at 92.

The government's contention, as we understand it, is that although there is a generalized obligation to experiment, the Secretary is free to choose to experiment with some but not other bidding system options. We do not believe that the legislative history supports this position insofar as it would allow him to ignore the options that do not involve front end cash bonuses as the bidding variable. Rather, it strongly suggests to us that Congress was particularly interested in assuring that the non-cash bonus variable bidding systems be tried at least during the five year period to determine their potential to attract bidders other than the major oil companies who had dominated the bidding under the pre-1978 OCSLA system.

Thus the Senate Committee Report emphatically stated:

> [The proposed act] authorizes a wide variety of *new bidding systems.* These are designed *to reduce the front end cash bonus,* increase the government's return on actual production of oil or gas, make it easier for smaller companies to enter the OCS development business, and increase the availability of funds for exploration.[64]

(emphasis supplied).

The mandate of the House Committee Report was equally vigorous: "It was the intention of the Committee that there be a clear mandate given to the Secretary to require him to use bidding systems other than the cash bonus bid." [65]

Both the Senate and the House Committee Reports state:

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[64] S. Rep. No. 95-284, *supra* note 17, at 46.

[65] H.R. Rep. No. 95-590, *supra* note 16, at 139.

> The basic thrust of all these new options is to *reduce the reliance on large front-end cash bonuses* as the means of obtaining a fair price for the public's property. The committee wants to authorize lease allocation systems that would *encourage the widest possible participation in competitive lease sales* consistent with receipt by the public of fair market value for its resources. The committee believes that [*net profit share* and other] arrangements can be effective in shifting Government revenue *away from initial bonuses* and into deferred payments made out of a lease-holder's profits based on actual production of oil or gas.[66]

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[66] S. Rep. No. 95-284, *supra* note 17, at 73; H.R. Rep. 95-590, *supra* note 16, at 139. Material in brackets appears in Senate Report only. The Senate Report noted that while

> These alternatives may not be "the perfect solution" . . . they should facilitate entry into the OCS development business of more independent producers and are certainly worth trying on an experimental basis.

S. Rep. 95-284, note 17, at 47. The House Report noted testimony:

> that the high front end bonus bids may have created a barrier to the entry of small and medium-sized oil firms as well as other potential exploiters to the OCS activity, and that these types of bids do not, after the completion of exploitation of a lease area, provide a fair return to the Government.

H.R. Rep. 95-590, *supra* note 16, at 138-39. And the House Report stated that:

> To increase competition for offshore leases and secure higher returns to the public Treasury, section 8 of the Outer Continental Shelf Lands Act has been amended to allow the Secretary *to use other bidding methods based on net profits; royalty; or work commitments stated in dollar amounts.*

Id. at 47 (emphasis supplied).

The Conference Report also adopted the basic thesis that:

> Bidding systems *other than bonus bidding, including royalty, net profit, work commitment, and nonenumerated systems* (emphasis supplied), are to be utilized in at least 20 percent and not more than 60 percent of the tracts offered for leasing in all OCS areas during each of the next 5 years.[67] (emphasis in original).

In view of these statements, we find it difficult to give credence to a view of the Act which would permit the Secretaries to totally ignore prominently mentioned new noncash bonus bidding alternatives without any testing at all, even if they have otherwise satisfied OCSLA's minimum percentage requirement for experimenting with new leasing systems.

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[67] H.R. Rep. No. 95-1474, *supra* note 22, at 92. *See also* H.R. Rep. No. 95-1835, 95th Cong., 2d Sess. 15 (1979) (Interim Report on the Activities of the Select Committee on the OCS During the 95th Congress); H.R. Rep. No. 96-1214, 96th Cong., 2d Sess. 14 (1980) (Final Report on the Activities of the Select Committee on the OCS) which both state:

> The 1978 Amendments provide for the use of *new* bidding systems including *variable* royalty, *variable net profit, fixed net profit,* and *work commitment bidding alternatives.* It [is] hoped that these new systems will increase OCS competition, more efficiently allocate scarce capital, and increase ultimate resource recovery.
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> * * * * *
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> Bidding systems *other than bonus bidding, including royalty, net profit, work commitment,* and nonenumerated systems are to be utilized in at least 20 percent and not more than 60 percent of the tracts offered for leasing in all OCS areas during each of the next 5 years.

(emphasis supplied).

Indeed we note that at one point in the legislative history of the 1978 Amendments, a proposed amendment was defeated on the House floor that would have allowed the Secretary "complete flexibility" to decide whether or not to issue regulations or utilize any specific alternative bidding systems. Representative Murphy, House manager of the bill, was adamantly opposed on the ground that "this amendment strikes at the very heart of this bill-promotion of competition." [68]

Representative Murphy objected strongly for the following reasons:

> During its almost 3 years of hearings, the committee heard repeatedly about the lack of competition in offshore leasing. In fact, the reason for this lack of competition is because of the present bidding system—the use of high front-end bonus bids which create a barrier for the entry of small and medium-sized oil firms as well as other potential exploration and development companies. . . . After much discussion, and much debate, the committee decided to include many new bidding options as part of the Outer Continental Shelf Lands Act.
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[68] *See* 124 Cong. Rec. H420-32 (daily ed. Jan. 31, 1978). Rep. Treen introduced an amendment which would have allowed the Secretary to

> propose any of the seven new bidding systems described in the committee bill, or any other new bidding system the Secretary wants to provide for. He *may* provide for these by regulation, but we do not mandate any particular new system . . . . He does not have to use any of these systems at all.

(emphasis supplied).

> This mandate of use of new bidding systems is strongly supported by the present Carter administration. *Recognizing the need to not only to experiment but use new bidding systems, the Secretary of the Interior has repeatedly stated to our committee that he believes that having such a mandate will be a positive incentive to doing extensive and detailed background, experimentation, and followup on new bidding systems.*
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> * * *
>
> The present provision therefore provides an incentive to use new bidding systems, and sufficient flexibility to the Secretary of Interior to experiment, study and finalize the use of the new bidding system. . . .[69]

(emphasis supplied).

During the debate that preceded defeat of the aforementioned amendment, numerous legislators, from both the majority and minority parties, reiterated their belief that experimentation with new non-cash bonus bidding systems was and should remain mandatory under the bill.[70]

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[69] *Id.* at H420-21.

[70] *Id.* at H421 (remarks of Rep. Miller) ("I think we see with the increase in royalty bidding, with the increase in net profit sharing, and with sliding royalties, that for the first time we will have major competition."); *Id.* at H423 (remarks of Rep. Rousselot) ("These experimental systems should be used but we should remember that they are just that—experimental. The Secretary should be mandated to use them in order to conduct experiments to determine their worth; however, the percentage of use should be smaller . . . ."); *Id.* at H424 (remarks of Rep. Miller) ("I suggest we give the Secretary the mandate to go out and use these

We conclude therefore from a reading of the legislative history that the Secretary of Energy does have a statutory obligation to promulgate regulations on the major alternatives to front end cash bonus bidding, including the variable net profit share bidding option so as to allow experimentation with such a

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alternative . . . systems, so we can get the greatest amount of participation and also have the greatest chance of producing revenues"); *Id.* at H425 (remarks of Rep. Brown) ("Only by experimentation will the suitability of the various bidding systems become known"); *Id.* at H425 (remarks of Rep. Hughes) ("Why we in this legislation directed the Secretary to utilize the alternative systems is because we want to give the alternative systems a fair chance, something they have not had in this country in the entire 25 years of oil and gas development in America. We want to give these other systems a fair trial"); *Id.* at H426 (remarks of Rep. Hughes) ("But I think the fact of the matter is that we need to send a clear signal to the Secretary of the Interior to utilize in a realistic fashion during the next 5 years systems other than the bonus bidding systems"); *Id.* at H427 (remarks of Rep. Fish) ("These experimental systems should be used. There is, once again, no dispute between the minority and the majority on that subject, but we should remember the new alternative, experimental systems are just that—experimental. The Secretary should be mandated to use them in order to conduct experiments but the percentage must be smaller than is proposed in the committee bill . . . ."); *Id.* at H429 (remarks of Rep. Murphy) "The language in the bill at the present time requires competition in the leasing arrangements on the Continental Shelf . . . . At the present time we find almost 100 percent of the bidding is the bonus-bid, upfront, big cash-expenditure type of bidding that dominates the sale of tracts in the Outer Continental Shelf. The purpose of the committee saying that the Secretary should utilize alternate forms of bidding for only 5 years is that after 5 years the Secretary will have made his analysis as to which are the most cost-effective methods of bidding on the public lands.")

system to take place during the five year period specified for such experimentation.[71]

The Pace of Implementing OCSLA

As of this date, over two years after passage of the Act, regulations have not been issued nor consequently has there been any experimentation with three of the seven bidding systems enumerated in OCSLA, two of which do not involve cash bonus bidding.[72] The government has argued strenuously, nonetheless, that Congress in its oversight capacity has condoned the failure to experiment with or issue regulations on variable net profit or work commitment bidding systems. Congress has kept abreast of the development of the OCSLA bidding systems, primarily through the activities of a House Select Committee on OCS Oversight ("Oversight Committee").[73] Appellees would imply Congressional approval as to their pace in implementing OCSLA by virtue of the Oversight Committee's silence. It is, of course, the earlier Congressional *action* in adopting OCSLA rather than subsequent Congressional *inaction*, to which we must look primarily for reliable guidance

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[71] A prerequisite to the mandated experimentation is issuance of a regulation. Regulations have not been issued at this time for the alternatives specified in sections 8(a)(1)(E)-(G). *See* note 7 *supra*. The Act also requires the Secretary of Energy to report to Congress on the nonuse of bidding systems in an annual report mandated by section 8(a)(9) of OCSLA. 43 U.S.C.A. § 1337(a)(9).

[72] *See* note 71 *supra*. Cash bonus bidding is not involved in alternatives specified in paragraph (E) and (G) of section 8(a)(1). 43 U.S.C.A. §§ 1337(E), (G).

[73] *See generally* H.R. Rep. No. 96-1214, *supra* note 16, esp. at 22-56.

in determining the scope of appellees' obligations under the Act.[74] But, even if we are to weigh the expressions of a post-enactment committee significantly on the intent of an earlier Congress that passed the legislation, we find little sustenance in the hearings and report of the Oversight Committee on this specific issue. In its 1979 report the Oversight Committee warned: "If sales are less than competitive, *if new systems are not used*, if fair market value is not obtained, action might be necessary."[75] (emphasis supplied). It anticipated that "During the next two years, *new regulations are to be promulgated*, new leasing programs prepared, *new bidding systems established and applied*. . . . During the next two years most frontier areas will be leased and exploration in some frontier areas substantially completed."[76] (emphasis supplied).

In December, 1979 the Committee held hearings on the implementation of alternative bidding systems and was told by Energy officials that "in the near future [Energy] will be published final regulations dealing

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[74] In general, "'[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'."

CPSC v. GTE Sylvania, Inc., 100 S. Ct. 2051, 2060-61 (1980) (*quoting* United States v. Price, 361 U.S. 304, 313 (1960)). There is, however, reason to give somewhat greater weight than usual to the views of a post-enactment oversight committee charged with responsibility for supervising the administration of the Act. It is also noteworthy that in this present case the Chairman of the Oversight Committee, Rep. Murphy, was also the floor manager of the House bill.

[75] H.R. Rep. No. 95-1835, *supra* note 13, at 14.

[76] *Id.* at 25.

with alternative bidding systems."[77] In those same hearings, one of appellants here, Energy Action Educational Foundation, urged issuance of regulations dealing with both fixed and variable net profit share bidding, while Energy and Interior officials informed the Committee of their progress on fixed net profit share bidding and other alternatives avoiding any mention of variable net profit bidding at all.[78] The final report of the Oversight Committee then concluded that "the implementation process has proceeded reasonably well, but there have been delays as exemplified by the jurisdictional conflict between [Interior] and [Energy]"; it recommended, accordingly, "interagency coordination must be enhanced . . . and the issuance of [Energy] regulations in its five major

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[77] H.R. Rep. No. 96-1214, *supra* note 16, at 49.

[78] *See* Oversight Hearings, *supra* note 43, at 448 (Nov. 15, 1979), 810 (April 15, 1980), 910 (April 29, 1980) (Statements of Edwin Rothschild, Director, Energy Action Educational Foundation); *and* at 494-95 (Dec. 4, 1979). (Statement of R. Dobie Langenkamp, Deputy Asst. Secretary Oil, Natural Gas and Shale Resources, Department of Energy); at 542, 545 (Feb. 6, 1979) (Statement of Cecil D. Andrus, Secretary, Department of Interior); at 580 (Feb. 6, 1980) (Statement of John Sawhill, Deputy Secretary, Department of Energy).

Regulations for some form of work commitment bidding system were reported to be under consideration and scheduled for promulgation in fiscal year 1981. *Id.* at 810 (April 15, 1980), 920 (April 29, 1980) (Statement of Edwin Rothchild); *id* at 1270 (May 15, 1980) (Statement of R. Dobie Langenkamp) work commitment bidding system will be out "sometime in the fall"); at 1272 (May 15, 1980) (Timetable for Issuance of OCS Regulations) (Regulation for work commitment system projected Dec. 1980).

areas of responsibility [should take place] by January 1, 1981." [79]

It is thus difficult for us to construe the Oversight Committee's statements as excusing appellees what we construe as a statutory obligation to issue regulations necessary to allow all bidding options under section 8 to be tested in some fashion during the five year "experimental" period. It seems more likely to to us that the Oversight Committee (either intentionally or unintentionally) simply avoided directly resolving any implicit conflict between Energy Action's plea for action and the Department of Energy's silcence with respect to issuance of regulations on variable net profit bidding. We must, consequently, look almost entirely to the original legislative history preceding enactment for our guidance and we construe that history as requiring good faith experimentation with non-cash bonus alternatives.

We also note that appellees have never, in fact, stated in the annual reports to Congress required by the Act that they do not intend to utilize a variable net profit bidding system.[80] In contrast the Depart-

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[79] H.R. Rep. No. 96-1214, *supra* note 16, at 70.

[80] *See* Department of Energy: *Report to Congress on Various Bidding Options Utilized in FY-79 Lease Sales on the OCS;* and the FY-78 Report, *supra* note 45, J.A. 232. These annual Energy Reports are prepared pursuant to 43 U.SC.A. § 1337(a)(9), which provides:

> (9) Within six months after the end of each fiscal year, the Secretary of Energy, in consultation with the Secretary of the Interior, shall report to the Congress with respect to the use of various bidding options provided for in this subsection. Such report shall include—
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> (A) the schedule of all lease sales held during such year and the bidding system or systems utilized;

(B) the schedule of all lease sales to be held the following year and the bidding system or systems to be utilized;

(C) The benefits and costs associated with conducting lease sales using the various bidding systems;

(D) If applicable the reasons why a particular bidding system has not been or will not be utilized; and

(E) if applicable, the reasons why more than 60 per centum or less than 20 per centum of the area leased in the past year, or to be offered for lease in the upcoming year, was or is to be leased under the bidding system authorized by subparagraph (A) of paragraph (1) of this subsection.

See also Department of the Interior: *OCS Oil and Gas Leasing: An Annual Report on the Leasing and Production Program, Fiscal Year 1979* (October 20, 1980) *and Fiscal Year 1978* (December 1979). The Interior Reports are prepared pursuant to 43 U.S.C.A. § 1343(2), which provides:

§ 1343. Annual reports by Secretary to Congress

Within six months after the end of each fiscal year, the Secretary shall submit to the President of the Senate and the Speaker of the House of Representatives the following reports:

* * * * *

(2) A report prepared after consultation with the Attorney General, with recommendations for promoting competition in the leasing of outer Continental Shelf lands, which shall include any recommendations or findings by the Attorney General and any plans for implementing recommended administrative changes and drafts of any proposed legislation, and which shall contain—

(A) an evaluation of the competitive bidding systems permitted under the provisions of section 1337 of this title, and, if applicable, the reasons why a particular bidding system has not been utilized;

(B) an evaluation of alternative bidding systems not permitted under section 1337 of this title, and

ment of Energy has utilized the end of the year report to announce its dissatisfaction with royalty bidding.[81]

Appellees also argue that because "the basic thrust of *all* these new options is to reduce the reliance on large front end cash bonuses as a means of obtaining a fair price for the public's property," [82] it is sufficient to utilize only some of the enumerated bidding methods. Again, the legislative history is too emphatic about the prominent role of the new, and as yet untried non-front end cash bonus options to permit so liberal an interpretation of the mandate on

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why such system or systems should or should not be utilized;

(C) an evaluation of the effectiveness of restrictions on joint bidding in promoting competition and, if applicable, any suggested administrative or legislative action on joint bidding;

(D) an evaluation of present measures and a description of any additional measures to encourage entry of new competitors; and

(E) an evaluation of present measures and a description of additional measures dealing with supplies of oil and gas to independent refiners and distributors.

See H.R. Rep. No. 95-1835, *supra* note 13, at 30:

> Use of new systems can be avoided by the Secretary of Interior in certain circumstances. *Congress must assure that new systems are effectively utilized or if not used that adequate reasons are detailed.*

(emphasis supplied).

[81] *See* Energy's FY-78 Report, *supra* note 84, at 18, J.A. 232, 249. Appellees' annual reports also have not invoked the so-called "escape hatch" clause of section 8(a)(5)(B) of the Act. *See* note 21 *supra*.

[82] Brief for Appellees at 31, *citing* S. Rep. No. 95-284, *supra* note 17, at 139 (quotation at 73).

experimentation. It may well be that one or more of these new options, when tested may prove unsatisfactory, but it is not credible that the Secretaries can permissibly reject them out of hand, when the statutory history is explicit regarding Congressional interest in maximizing competition and encouraging "the widest possible participation" in lease sales.

Alternatives like the variable net profit share bidding option (and the work commitment bid system) are designed to reduce front end cash payment and to stimulate competition to a greater degree than the options already in place which still focus bidding on the front end cash bonus. Although we obviously cannot determine at this point whether the non-cash bonus variable systems will have the salutory effect in practice that their supporters claim, acquiring this information is precisely the objective of the Congressionally mandated experimentation with new systems.

It is also clear to us that the obligation to experiment with "net profit share" bidding so frequently referred to in the Committee reports and floor debate is not fully satisfied solely through experimentation with *fixed* net profit share bidding. The statute itself sets out as distinct alternatives two types of net profit share bidding—fixed and variable—to be experimented with in the five year period. The variable net profit bidding alternative represents the more innovative alternative, and the greater departure by far from the traditional cash bonus system. The separate provision for the variable net profit share bidding alternative in section 8(a)(1)(E) did not materialize out of thin air; its origins may be traced to specific testimony and dialogues between legislators and witnesses about this particular type of bidding while OCSLA was pending before Congress.

During the hearings several witnesses and legislators exhibited significant interest in and knowledge of *variable* net profit share bidding;[83] comparisons were made between variable royalty and variable net profit options; comparisons which usually favored variable net profit bidding.[84] Discussions were also held on the differences between variable net profit share bidding and variable cash bonus-fixed net profit share bidding.[85] The testimony about variable net profit

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[83] *See, e.g., Hearings Before the Ad Hoc Select Committee on the Outer Continental Shelf on H.R. 1614 (House of Representatives)*, 95th Cong., 1st Sess. (1977) [hereinafter *"House Hearings on H.R. 1614"*] at 784-89 (statement of Dr. Walter Mead, Dept. of Economics, U.C. at Santa Barbara); and 941 (statement of T. F. Hart, Vice President, Shell Oil Co.); at 1091, 1106-20 (statement of Richard H. Bowerman, Associated Gas Distributors); at 1197 (statement of John T. Loftis, Jr., Senior Vice Pres. Exxon Oil Co.) at 1491-1500 (statements of Lynn Adams and William Miller, Domestic Petroleum Council); *and see Hearings Before the* Committee on Energy *and Natural Resources on S. 9, 95th Cong., 1st Sess. (1977) (Senate)* [hereinafter *"Senate Hearings on S. 9"*] at 231 (colloquy between Robey Clark, Diamond Chemical Oil, and Sen. Johnston); at 286 (colloquy between Lynn Adams, Domestic Petroleum Council, and Sen. Johnston); at 369-72 (colloquy between T. F. Hart and Sen. Johnston); at 530 (statement of Robert LaResche Commissioner of Natural Resources, State of Alaska).

[84] *House Hearings on H.R. 1614, supra*, note 83, at 1496-1501. The Domestic Petroleum Council presented a detailed analysis of cash bonus bidding, net profit bidding, and royalty bidding that concluded "royalty bidding is the least attractive." *Id. at* 1499. *See Senate Hearings on S. 9, supra* note 83, at 286 (statement of William Miller) ("no question" net profit variable bidding is better than gross royalty variable bidding).

[85] *See, e.g., Senate Hearings on S. 9, supra* note 83, at 372 (statement of T. F. Hart, Shell Oil Co.) (fixed net profit option is an "entirely different story" from variable net profit bidding, "a situation . . . we can live with.").

bidding was by no means all favorable; concerns were expressed that it would encourage irresponsible bidders; discourage perservance in drilling; would be costly and complicated to administer and involve the government too deeply in the oil and gas business.[86] Yet even some of its vigorous opponents suggested it might prove useful and attractive for particular tracts.[87] Representatives of the gas distribution industry, among others, affirmatively advanced a variation of this option.[88] Senator Johnston questioned

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[86] *See, e.g., House Hearings on H.R. 1614, supra* note 83, at 784-789 (statement of Dr. Mead, Dept. of Economics, U.C. at Santa Barbara); at 941 (statement of T. F. Hart, Shell Oil Co.); at 1197 (statement of John Loftis, Exxon Oil Co.); at 1493-1495 (supplementary statement of Domestic Petroleum Council). *But compare Senate Hearings on S. 9, supra* note 83, at 530 (statement of Robert LaResche, Commissioner of Natural Resources, State of Alaska); *House Hearings on H.R. 1614, supra* note 83, at 1234 (statement of James F. Flug, Energy Action Committee); at 1085, 1091, 1106-20, 1136-37 (statement of Richard Bowerman, Associated Gas Distributors).

[87] *Senate Hearings on S. 9, supra* note 83, at 371 (colloquy between T. F. Hart and Sen. Johnston):

> Senator Johnston. You are making a very strong case here, Mr. Hart. Does that mean in all cases it would never be a good thing to have discretionary net profit bidding?
>
> Mr. Hart. I can envision, and we can build this case for you, a few windows in this picture, and this would have to do with critical sizes of fields founds and critical costs of platforms, where net profits might be somewhat more attractive in the sense we go for the oil rather than if we had bonus bid. Small windows, and by definition, marginal fields.

[88] *House Hearings on H.R. 1614, supra* note 83, at 1111 (statement of Richard H. Bowerman, Associated Gas Dis-

several witnesses specifically about the variable net profit share method.[89] Although subsequent to enactment the distinction between fixed and variable profit sharing options seems at times to have blurred,[90] the pre-enactment record reveals a clearer focus, among key witnesses and legislators, on the two distinct options dealing with profit share bidding, a recognition ultimately reflected in the express language of section 8 of the Act. Particularly in light of assurances by administration witnesses that "all" alternative options to cash-bonus bidding would be tried[91] we do not think it a reasonable construction

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tributors) (variations of net profit bidding would "increase the opportunity for participation in the most promising remaining exploration areas, the offshore, by the distribution company, the element of the gas industry whose interest in new gas supply most closely approaches that of the consumer and the federal government. . . .").

[89] *Senate Hearings on S. 9, supra* note 83, at 245, 286, 371.

[90] *See* pp. 16-17 *supra*. During the post-enactment hearings of the Oversight Committee, Energy did, however, specify that the imminently expected regulations on "net profit share bidding" involved cash bonus as the bid variable with net profit share at a fixed rate. *See Oversight Hearings, supra* note 43, at 494-95 (Dec. 4, 1979) (prepared statement of R. Dobie Langenkamp, Deputy Asst. Secretary, Oil, Natural Gas and Shale Resources, Dept. of Energy).

[91] *See, e.g., House Hearings on H.R. 1614, supra* note 83, at 204. Secretary Andrus stated:

> While administrative flexibility is desirable, I am not concerned about the percentage mandate because of my *commitment* to *substantial* use of bidding systems other than the cash bonus system.
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> * * * * *
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> Given our committment to insuring the bidding systems used are the best available, the Department is con-

sidering alternatives to identify those systems which should be tried first. Such alternatives include *profit sharing systems*, several variations of royalty bidding systems, and the Phillips plan . . . *The Department will develop a program for testing and using these systems* even if a limit is not placed on the use of cash bonus bidding.

Id. (emphasis supplied).

John O'Leary, Administrator, Federal Energy Administration stated:

I think that we should do everything in our power to foster competition for leases. We should have a very deep support for the variations on the existing themes of leasing, and I believe there should be a more open system here with more people capable of coming in and getting positioned to develop this resource. I think we should have broad latitude to scrap the present system if it does not work, to keep it in place if it does *after a very very hard examination of all the alternatives.* Comparing our system with the system employed by European states with regard to the North Sea, they have achieved a successful result without their using the sort of competitive techniques that we have. This does not mean that they are right, but it does not mean that we are right either. I think we should have a *very open examination of alternatives* and then get those that fit the case.

Id. at 211 (emphasis supplied).

Darius Gaskins, Director, Bureau of Economics, Federal Trade Commission, stated:

Before we limit ourselves to specific alternatives, we should carefully evaluate these alternatives in operation. One of the best features of this proposed legislation is that it will allow the selection of leasing systems based on practical experience rather than on theoretical studies of prejudgment.

Id. at 663.

of the Act that experimentation with variable net profit share bidding can be rejected.

The Secretaries' Obligations At This Time

Having found in the language and history of the Act a Congressional imperative to promulgate regulations, as a necessary prelude to experimentation, involving non-cash bonus statutory bidding alternatives, including variable net profit share bidding, the critical question is when does such an obligation become due. Appellees argue that even if such an obligation exists, their pace in issuing regulation so far has been reasonable and OCSLA contains no specific deadlines for promulgation of particular regulations.[92] Indeed, appellees advance the circular assertion, noted by the district court, that the regulations have proceeded apace with the Secretary's desire to utilize particular bidding systems.[93]

We conclude that the obligation to promulgate regulations on net profit variable bidding must be fulfilled with the maximum possible speed consistent with procedural and statutory rulemaking requirements. Congress legislated five years as an "experimental" period with alternative bidding systems; that period began September 18, 1978, over two years ago. Even if the Secretary were to propose regula-

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[92] They argue, not unreasonably, that bidding regulations require considerable study, coordination between the Energy and Interior Departments, consultation with the Department of Justice and the Federal Trade Commission, 42 U.S.C. § 7153(b), and in the case of net profit bidding, promulgation of regulations on the way in which profits will be calculated at least ninety days in advance of any sale. Appellees' Brief at 23, 27.

[93] *See* Mem. op., *supra* note 41, at 7.

tions tomorrow, it would still take well into 1981 before they could be finally promulgated, and we are aware that even the proposal of such regulations must be preceeded by weighty deliberations.[94]

By mid-1981—before the next lease sale, now scheduled for May—the midway point in the five year experimental period for alternative bidding systems will have passed. If there is to be meaningful experimentation with variable net profit share bidding, then preparations for promulgation of the necessary regulations must begin immediately. The five year comprehensive leasing plan which went into effect in June, 1980 anticipates thirty six lease sales, almost one-third of which will have been held by the end of 1981. If the variable net profit share bidding option is to have any kind of a fair trial, it would seem that it must be eligible to be utilized within the next year.[95]

The government correctly notes the understandable reluctance of courts to block scheduled lease sales

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[94] Nevertheless, we note that accounting regulations as to what constitutes "net profit" have already been promulgated prior to the issuance of the fixed net profit share regulations authorized by 43 U.S.C. § 1337(a)(1)(D) in 45 Fed. Reg. 36784 (May 30, 1980). When asked whether the same accounting system could be used in connection with a variable net profit system an Interior official indicated that he did not "know any reason why not." Heintz Deposition, *supra* note 44, at 122.

[95] We do not of course make any ruling at this time that affects the Secretary of the Interior's discretion as to when and how much the variable net profit share option must be utilized once it becomes available by the issuance of regulations. We are assuming that regulations for a work commitment bidding system will be achieved in approximately the same time period. *See* note 45 *supra*.

until regulations on all enumerated bidding systems are issued.[96] This reluctance to upset the orderly administration of OCS leasing is most recently reflected in this court's affirmance of the district court's refusal to enjoin the three sales scheduled this fall.[97] Our deference to the discretion of the district court on this aspect of her ruling is grounded in reasonableness of her conclusions regarding irreparable harm and the balance of public equities in the three sales scheduled for the end of 1980. We can, however, reasonably draw the line as to future sales now scheduled for late spring and the summer of 1981. First, it should be feasible for the needed regulations to be in place before the next round of sales. Second, given the relatively distant future date of the 1981 sales, if the schedule needs to be adjusted at all the likely cost and inconvenience should not be as substantial with several months advance notice as would have been the case for the three sales scheduled later

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[96] Brief for Appellees at 33-34. *See also, e.g., Oversight Hearings, supra* note 43, at 1204-6 (letter from Alan A. Parker, Assistant Attorney General, to Rep. Murphy) (April 30, 1980). We agree with the Administration position that Congress did not intend to hold up all OCS leasing and development until all the regulations are promulgated. To do so would be to undervalue the stated statutory objectives of expediting development of the OCS and mitigating this nation's energy problems. However, it is also fair to say that Congress did not endorse a situation where significant non-cash bonus bidding methods it specified would not be tested in a significant manner. Hopefully, scheduled sales for 1981 need not be postponed or at least not delayed for any substantial time before the new regulations can be put in place.

[97] Energy Action Education Foundation v. Andrus, No. 80-2127 (D.C. Cir. Sept. 29, 1980) (partial affirmance of denial of preliminary injunction).

this year. Most important, by mid-1981 failure to issue regulations on variable net profit share bidding and work commitment bidding creates a clear violation of the statutory mandate to experiment with alternatives to front end cash bonus systems and accordingly a clear case of irreparable harm to appellants, and the public and private interests they represent. Thus, the public harm in losing any realistic opportunity to test all the OCSLA leasing methods will outweigh any incidental delay to the transaction of additional lease sales. Further delay in issuing these regulations would mean that experimentation with these options could only occur, if at all, in the last year or two of the five year period, upon whatever tracts remain for exploration. This circumstance would in turn raise a serious question of whether a fair test of variable net profit sharing would be possible, if use of that option were consigned to the last five years for sales of relatively few and possibly less significant tracts. While, as the government maintains, it may be advantageous to garner experience with one new bidding system before moving on to experiment with another [98] we conclude the time has now passed when such advantages can be said to outweigh the disadvantages of failing to allow for any adequate testing or experimentation with the major non-cash bonus of Congressionally authorized bidding systems [sic]. In sum if there is to be significant experimentation with the range of non-cash options specified in the Act, the remaining regulations for those options should be in place in 1981, before the

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[98] *See, e.g.*, Brief for Apellees at 22-4. We are not unaware of the advantages that have been cited for trying new bidding options sequentially. *E.g.*, 44 Fed. Reg. 70390, 70397 (Dec. 6, 1979).

next battery of planned lease sales which begin in May, 1981.[99]

III. Conclusion

For the foregoing reasons, it is our judgment that appellees have an obligation to issue regulations for the remaining two non-cash bonus bidding systems enumerated by Congress in section 8(a)(E) and (G) of the Act and that the obligation to put the regulation-issuing process into operation vests immediately and should be completed in mid-1981. To conclude otherwise would be to find, against the weight of the legislative history, that Congress intended to allow two-thirds of the non-cash bonus variable bidding options it specified to go untried or at best to be placed at an intolerable disadvantage in the five year experimental period despite Congress' explicit commitment to encouraging greater competition and broader participation in OSC development.

Upon remand, then, the district court should insure that, to the maximum extent feasible, regulations for the two non-cash bonus variable bidding options set out in section 8(a)(E) and (G) are promulgated before further lease sales take place in 1981. The court, within its general equitable discretion to order or withhold injunctive relief in the public interest, after hearing from the Secretaries as well as the plaintiffs, should immediately proceed with the task of setting a precise timetable for their issuance that takes account of future scheduled lease

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[99] Should the new alternatives prove not to be promising bidding systems, the Secretary can, of course, subsequently report this determination to Congress as it did in the case of the variable royalty bidding option.

sales as well as any other relevant information proferred by the parties.*

Remanded for proceedings consistent with this opinion

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* The plaintiff-appellants (*see* note 6 *supra*) have standing to sue under section 23(a) of OCSLA, 43 U.S.C. § 1349(a) which authorizes citizen suits to compel compliance with the Act.

Appellees unsuccessfully challenged appellants' standing in 1979 before Judge Robinson (*see* Memorandum of the United States in Opposition to Motion for Preliminary Injunction, J.A. 174, 192-94), before this court on the previous appeal (*see* Energy Action, *supra* note 2, Brief of Appellees at 28) and again this year before Judge Johnson (*see* Energy Action, Civ. No. 1633, Brief for Defendants at 10-15, filed June 23, 1980, Docket No. 50; and Reply Brief for Defendants at 5-9, filed July 29, 1980, Docket No. 64). In contrast; on the present appeal the standing issue was neither briefed nor argued by appellees. When questioned at oral argument on September 26, 1980 about the subject of standing appellees merely indicated that they reserved but had elected not to press at this time their prior challenge to appellants' standing. Then, while the opinion for this expedited decision was at the printer, the court received appellees' motion for leave to file a supplemental brief on the standing issue.

Mindful of the strong policy reasons for restricting consideration of post-submission filings we nevertheless feel that now is a sensible time to dispose of the threshold jurisdictional question reintroduced by appellees' belated assertion of appellants' lack of standing. We find the jurisdictional question to be straightforward and because we do not agree with appellees that appellants are without standing, we do not believe that appellants are prejudiced by not having the opportunity to submit supplemental argument for our consideration.

OSCLA expressly authorizes citizen suits like the present action and identifies who may bring the action:

> [A]ny person having a valid legal interest which is or may be adversely affected may commence a civil action

> on his own behalf to compel compliance with this subchapter against any person, including the United States . . . for any alleged violation of any provision of this subchapter . . . .

43 U.S.C. § 1349(a). We believe appellants have such a valid legal interest both in their capacity as competitors and co-producers on the OCS with the federal government and in their capacity as representatives of consumers of the oil produced on the OCS. Furthermore, they have "a legal interest which is or may be adversely affected" by appellees' complained of conduct.

In essence, appellants claim injury because the failure to use non-cash bonus bidding and the continued predominant use of cash bonus bidding tends to reduce revenues to the federal government, to stifle competition on the OCS, and depresses oil and gas production.

The California government appellants (the State Lands Commission, and the City of Long Beach) are competitors and co-producers on the OCS with the federal government. As lessors and producers of OCS oil they allege concrete and tangible economic injury caused by appellees' failure to increase returns on federal OCS leases. (Complaint ¶ 132, J.A. 1, 71-72) These two appellants posit a present and future disadvantage to their own OCS activity by their inability to compete for bidders who are attracted to the significantly higher returns to private investment available through federal lease. Additionally, appellants maintain that they could obtain a higher return in so-called "drainage" situations if appellees would utilize higher return bidding systems. In drainage situations the state is part owner with the federal government of an OCS site and shares in royalties generated by a lease on the site.

It is even more readily apparent that the consumer appellants have standing to sue for violation of an Act designed to increase competition and to step up utilization of energy resources on the OCS. Consumers are the ultimate beneficiaries of both vigorous competition and greater availability of domestic fuel. Here the consumer appellants contend that appellees' leasing activity causes direct harm to consumers by inflating prices, limiting supplies, and restricting choice on the market. This is the type of economic harm commonly present in consumer based litigation. *See e.g.*, Consumers

Union of the United States, Inc. v. Sawhill, 525 F.2d 1068 (T.E.C.A. 1975); Consumer Federation of America v. FPC, 515 F.2d 347 (D.C. Cir. 1975); Consumers Union of the United States, Inc. v. FPC, 510 F.2d 656 (D.C. Cir. 1974); *see also* Reiter v. Sonotone Corp. —— U.S. ——, 99 S.Ct. 2326, 2331 (1979) (consumers have standing under the Clayton Act); Duke Power Inc. v. Carolina Environmental Study Group, 438 U.S. 59, 72-81 (1978) (individuals and environmental and labor organizations have standing under the Price-Anderson Act). *Cf.* Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977).

In sum, the Act's grant of standing to persons "having a valid legal interest" which "may be adversely affected" includes consumers of oil and gas products who seek redress for the failure of the government to implement the provisions of OCSLA intended by Congress to foster competition and stimulate OCS development.

In the present case we are satisfied that both the California governmental appellants and the consumer appellants have a concrete stake in the outcome of the lawsuit. They have alleged a "distinct and palpable injury," Warth v. Seldin, 422 U.S. 490, 501 (1975), and have asserted a plausible theory for tracing this harm to appellees' challenged conduct. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 261 (1977). This means that appellants not only satisfy the statutory requirement for standing but, under established law, the constitutional requirements as well. United States v. SCRAP, 412 U.S. 669, 683-690 (1973).

To the extent there is uncertainty about the actual scope of the purported injury, this lack of information may be attributed in part to appellees, whose failure to test non-cash bidding alternatives is the cause of remaining speculation about the benefits of the non-cash bidding alternatives in practice. Moreover, by mandating use of non-cash bidding systems Congress has recognized a causal nexus between government OSC leasing activities and competition and energy production.

Appellees cannot rely on the legislative history of the Act to support a narrow reading of section 23(a). We have already noted that the interests of parties like appellants, and their desire to obtain a greater role in the course of OCS

development, were among the significant forces which lead to the OCSLA revisions of 1978 (*see* p. 9 *supra*). There is no indication that Congress intended to preclude this type of private party from filing citizen suits under section 23(a). On the contrary, the House Report states:

> [Section 23(a)] provides that suits may be brought by "any person having a valid legal interest which is or may be adversely affected." Thus, the scope of persons who can sue are those who can show an actual interest that is being negatively affected, or will be negatively affected at a reasonable time in the future. The interest must be discernible and ascertainable. *Standing to sue includes not only those who have an economic interest,* or who have suffered or will probably suffer a tortuous [sic] injury, *but also those who may have a definable aesthetic or environmental interest.* Specifically, the Committee intends that this includes persons who meet the requirement for standing to sue set out by the Supreme Court in *Sierra Club* v. *Morton,* 405 U.S. 727 (1972).

(emphasis supplied) H.R. Rep. No. 95-590, *supra* note 16, at 161. Here appellants represent that their economic interests have been and will be harmed. The injury that they specify is at least as discernible and ascertainable as the "aesthetic" and "environmental" interests which could, according to the House Report, give rise to a suit. Subsequent to enactment, the Oversight Committee specifically took note of pending lawsuits by citizens groups involving the OCS including this one. H.R. Rep. No. 96-1214, *supra* note 16, at 59-63; H.R. Rep. No. 95-1835, *supra* Note 13, at 20-22. The Oversight Committee indicated that the concern of section 23 was to provide for orderly resolution of such OCS litigation. *E.g.*, H.R. Rep. No. 96-1214, *supra* note 16, at 18-19. It was apparent that the Committee felt that the way to forestall litigation and to avoid delay in development of the OCS was to implement the new provisions of OCSLA rather than, as appellees would have it, deny private groups access to court by narrowly construing section 23(a). H.R. Rep. No. 95-1835, *supra* note 13, at 20-22.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 80-2127

Civil Action No. 79-1633

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL., APPELLANTS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Filed Oct. 30, 1980

Before: ROBINSON and WALD, Circuit Judges; and HAROLD GREENE,* United States District Judge for the District of Columbia

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing, and it appearing that this Court, by order filed September 29, 1980, has affirmed the decision of the District Court's refusal

to enjoin three lease sales scheduled for the fall of 1980, it is

ORDERED AND ADJUDGED by this Court, that the order of the District Court on review herein, which refused to enjoin the lease sales scheduled for the fall of 1980, is affirmed, in accordance with this Court's order filed September 29, 1980; respondents are directed to proceed expeditiously to issue the regulations required by the Outer Continental Shelf Lands Act, and this case is remanded to the District Court for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: October 30, 1980

Opinion for the Court filed by Circuit Judge Wald

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1633

ENERGY ACTION EDUCATION FOUNDATION, ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, SECRETARY OF INTERIOR, ET AL., DEFENDANTS

Filed Sep. 17, 1980

MEMORANDUM OPINION

This matter is before the Court on Plaintiffs' Motion for Partial Summary Judgment or, in the Alternative, for a Preliminary Injunction. Defendants filed an opposition to the motion. After hearing the arguments of counsel for the parties, the Court took the matter under advisement.

BACKGROUND

In 1953 Congress passed the Outer Continental Shelf Lands Act ("OCS Act") to provide for the leasing of off-shore lands by the federal government to private companies for exploration and development of oil and natural gas resources. This Act gave the Secretary of Interior the authority and discretion to administer leases on federal off-shore lands through the use of two different methods of competitive bidding: (1) a cash bonus bid basis with a royalty fixed by the Secretary of not less than 12½

per centum of the gross revenue of the lease and (2) a royalty rate bid with a fixed cash bonus payment.*

Congress, recognizing the need to reform the OCS Act to avoid excessive dependence on foreign nations for oil and gas supplies, to expand production on the outer continental shelf, to assure a fair return to the public, and to foster competition for the leases, amended the OCS Act in 1978.** The 1978 Amendments were designed to expedite oil and gas exploration and production for domestic use, to insure the public a fair and equitable return on these resources, to preserve and maintain competition, and to provide for a balance of development with protection of the environment.

One of the primary purposes of the new legislation is to achieve a superior bidding system through experimentation. The OCS Act, as amended in 1978, provides the Secretary of Interior with authority to grant to the highest responsible qualified bidder or bidders by competitive bidding, oil and gas leases on submerged lands of the outer continental shelf. The statute enumerates the bases on which the bidding, which shall be by sealed bid and at the discretion of the Secretary, shall occur. The bidding systems are:

1. Cash bonus bid with a fixed royalty at not less than 12½ per centum;

2. Variable royalty bid, with either a fixed work commitment or a fixed cash bonus as determined by the Secretary, or both;

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* 43 U.S.C. § 1337(a) (1976).

** 43 U.S.C.A. § 1331 *et seq.* (West Supp. 1979).

3. Cash bonus bid or work commitment bid with a fixed cash bonus and a diminishing or sliding scale royalty of not less than 12½ per centum;

4. Cash bonus bid with a fixed share of net profits of not less than 30 per centum;

5. Fixed cash bonus with a variable net profit share;

6. Cash bonus bid with a fixed royalty at not less than 12½ per centum and a fixed per centum share of net profit of not less than 30 per centum;

7. Work commitment bid with a fixed cash bonus and a fixed royalty.

43 U.S.C.A. § 1337(a)(1)(A)-(G) (West Supp. 1979). Additionally, the statute provides for bidding on the basis of any modification of the aforementioned bidding systems or any other systems of bid variables, the terms and conditions which the Secretary determines to be useful to accomplish the purposes and policies of the statute. 43 U.S.C.A. § 1337(a)(1)(H) (West Supp. 1979).

From 1953 until the 1978 Amendments, almost all lease sales were conducted pursuant to the cash bonus-fixed royalty system. However, the royalty bid-fixed cash bonus bidding system was employed in lease sales in 1977 and the cash bonus-sliding scale royalty system was used in two lease sales in early 1978. Of the eight lease sales that have occurred since the passage of the 1978 Amendments, approximately one-half of the tracts have been offered pursuant to the standard cash bonus-fixed royalty system, and the other half by the cash bonus-sliding scale royalty system.

The OCS Act, as amended, further requires the Secretary of Interior to prepare and to maintain a comprehensive oil and gas leasing program to implement the policies of the Act. 43 U.S.C.A. § 1344(a) (West Supp. 1979). The leasing program is to consist of a schedule of proposed lease sales which the Secretary determines will best meet national energy needs for the five-year period following its approval or reapproval, and is to reflect consideration of environmental, social, and econmic concerns as well as the assurance of fair market value to the government on leased land. Congress also imposed the requirement that the Secretary apply alternative bidding systems, other than the cash bonus-fixed royalty, to not less than 20% and not more than 60% of the total area offered for leasing each year during the five-year period beginning September 1978. 43 U.S.C.A. § 1337(a)(5)(B) (West Supp. 1979).

The five-year leasing program contemplated by the statute was approved by the Secretary of Interior in June 1980. The lease sale scheduled for September 1980 is the first sale to take place under the program, and will employ the first four enumerated bidding systems.

The plaintiffs in this case, consisting of nine consumer organizations, three private citizen-taxpayers, and two California government entities, filed this action in this court on June 22, 1979. The complaint names as defendants the United States, the Secretary of Interior, and the Secretary of Energy. Plaintiffs seek declaratory and injunctive relief to prohibit the defendants from conducting any future leasing pursuant to the OCS Act, until the Secretary of Energy has promulgated regulations governing use of all alternative bidding systems authorized by the Act, in-

cluding systems allowing for the sharing of net profits. The plaintiffs further seek declaratory and injunctive relief to prohibit the further use of the cash bonus-fixed royalty bidding method, alleging that the use of this method does not comply with the intent of the OCS Act. The plaintiffs also seek an order by the Court directing defendants to review all existing leases and to take corrective action if such review reveals that the leases will not yield a fair return to the government.

On June 25, 1979, plaintiffs filed a motion for preliminary injunction to enjoin Lease Sale No. 48, which was to take place on June 29, 1979. Plaintiffs specifically sought to enjoin further lease sales in the absence of regulations for all the bidding methods contained in the OCS Act. Judge Aubrey E. Robinson denied the motion for preliminary injunction, ruling that plaintiffs had not shown a likelihood of success on the merits. The court found that the partial use of the cash bonus-fixed royalty system complied with the statutory requirement that a mix of that method along with other methods be used. Its use did not violate the purpose of the OCS Act. The court also found that defendants had not acted in an arbitrary or capricious fashion by failing to promulgate regulations for all the alternative bidding systems, in light of the complexity and sensitivity involved in the promulgation of the regulations. The Congressional oversight provision which is incorporated into the OCS Act led the court to find that there existed adequate safeguards against the improper use of bidding systems.

On two occasions the plaintiffs sought by motion to modify Judge Robinson's order: first, to restrain defendants from awarding any leases under Sale 48

on a cash bonus-fixed royalty basis, and second, to restrain the acceptance of bids and the award of leases under Sale 48 because the bidding results demonstrated that acceptance would be contrary to the requirements of the OCS Act. The first motion was rendered moot and the second motion was denied.

The plaintiffs appealed to the United States Court of Appeals for the District of Columbia Circuit from the denials by Judge Robinson of their motion for preliminary injunction ad motion for modification. Since Judge Robinson had based his decisions in part, upon his reading of the OCS Act amendments, the U.S. Court of Appeals undertook an examination of the meaning of the statute. In a unanimous opinion by the late Judge Leventhal, the the Court of Appeals affirmed the orders of Judge Robinson.*

Judge Leventhal found that the real question before the Court was "whether the continued partial use of cash bonus-fixed royalty bidding—as planned for the near future by the Secretary—violates the statutory scheme." The Court upon analysis of the statute along with relative parts of the legislative history, concluded that it did not. The Court further discussed whether at that point in time the failure of defendants to promulgate all regulations for alternative bidding systems violated the OCS Act amendments. The Court stated that on the record before it, it could not say that the government's actions to date had run afoul of the legislative scheme. The Court specifically left open the question of whether at some point in time the Secretary's delay in issuing other regulations and in failing to experiment more widely among alternative bidding systems

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* *Energy Action Educational Foundation* v. *Andrus*, No. 79-1768 (D.C. Cir. Dec. 20, 1979).

may constitute a violation of the OCS Act amendments. This is the issue before the Court at this juncture.

DISCUSSION

I. *Plaintiffs' Contentions*

Plaintiffs, in the instant motion, seek partial summary judgment or a preliminary injunction on the grounds that the failure of defendants to develop and implement regulations for all seven alternative bidding systems some two years after the enactment of the 1978 Amendments is violative of the OCS Act. They contend that not one single bidding system will be utilized in the three lease sales scheduled for 1980 that was not used prior to the 1978 Amendments and that every tract leased or proposed for leasing since September 1978 has followed the cash bonus bidding system. It is urged that defendants' failure to promptly promulgate regulations for all seven enumerated systems is not only an abuse of discretion but also a violation of the OCS Act in that the experimentation mandated by Congress is being frustrated.

Plaintiffs argue that the most important objective underlying the whole statute is the desire of Congress to try non-cash bonus bidding systems. They maintain, by reference to the statute and the legislative history, that Congress mandated the Secretary of Interior to use non-cash bonus bidding systems rather than cash bonus systems. It is only through non-cash bonus bidding, plaintiffs contend, that the public will achieve a principal goal of the 1978 Amendments; i.e., fair market value or a fair return on the leases.

Plaintiffs further argue that they, as well as Congress, wish to experiment with "profit share bidding"

with a fixed cash bonus, a successful bidding system used by the State of California. 43 U.S.C.A. § 1337 (a)(1)(E) (West Supp. 1979). Plaintiffs suggest that a review of the eight sales conducted since September 1978 makes it amply clear that the Department of Energy has no intention of promulgating regulations for variable profit share bidding. Thus, they urge that the lease sales scheduled for September 1980 should be enjoined since defendants persist in utilizing bidding systems that neither assure a fair return nor foster competition.

II. *Defendants' Contentions*

Defendants, in opposition to the motion, argue that the Department of Energy has issued regulations for four bidding systems since September 1978. These four systems, to be utilized in the September 1980 lease sales, are: (1) variable royalty bidding-fixed cash bonus; (2) cash bonus-fixed royalty; (3) cash bonus-sliding scale royalty; and (4) cash bonus-fixing net profit. Although defendants maintain that the OCS Act does not require the promulgation of regulations for every enumerated bidding system, defendants state that the Department of Energy is in the process of preparing regulations for the variable net profit share bidding system and the work commitment bid system options.

Defendants contend that even if it is found that regulations for each enumerated system are mandated, the pivotal question is whether the pace of issuing the regulations is in accordance with law. They maintain that the issuance of regulations complies with the statutory mandate and, more importantly, the OCS Act contains no deadlines for promulgation. Defendants also assert that the development of regu-

lations have coincided well with their utilization. Defendants also contend that their conduct is in conformance with the statutory mandate as Congress did not intend to discourage bidding systems which contain cash bonus as a bid component.

III: *The Motion for Partial Summary Judgment*

A motion for summary judgment places the burden on the moving party to establish that there is no genuine issue of material fact and that judgment should be granted as a matter of law. Plaintiffs contend that this Court should grant them partial summary judgment, finding that there is no dispute as to any material fact and that as a matter of law, the defendants' failure to develop regulations for all seven alternative bidding systems is a violation of the OCS Act.

The plaintiffs base their request for partial summary judgment on those portions of the OCS Act and its legislative history which authorize and encourage the promulgation of regulations for and the implementation of alternative bidding systems. Plaintiffs interpret the language and history of the OCS Act to mean that Congress intended the Secretary of Interior to use bidding systems other than cash bonus systems. In contending that Congress specifically sought the use of non-cash bonus systems to experiment and to determine which systems are best suited for lease sales, plaintiffs argue that defendants' failure to develop regulations for non-cash bonus systems demonstrates a refusal to experiment with statutorily required alternative systems. All parties agree that no one bidding system can be used prior to the promulgation of regulations for that system. Thus, plaintiffs assert defendants' failure to issue the necessary

regulations precludes the use of the alternative bidding systems contemplated by Congress, thereby frustrating Congressional intent and violating the statute. Plaintiffs further read the legislative history to mean that regulation for all bidding systems must be promulgated before lease sales can proceed.

Plaintiffs cite the opinion of the Court of Appeals which states, "at some point in time the Secretary's delay in issuing profit-sharing regulations and in failing to experiment among alternative bidding systems more widely may constitute a violation of the OCS Act amendments," Slip op. at 21, to argue that this is the point in time at which the Secretary is in violation of the Act.

Defendants contend that there is no timetable for promulgation of the regulations, and even if there is a timetable, the Secretary's present rate of promulgation is at a pace in accordance with the law. Defendants dispute plaintiffs' interpretation of the statute and legislative history arguing that no where is it mandated that the Secretary promulgate regulations for or use every bidding system contained in the Act. Furthermore, defendants argue that the Secretary has been granted by Congress wide discretion in the use of the bidding systems. Defendants contend and have produced evidence to support their position, that they have experimented with alternative bidding systems, through the past use of the cash bonus-sliding scale royalty system, and will experiment with the cash bonus-fixed net profit share system in the September 1980 sale. Therefore, defendants deny that the absence of regulations for all bidding systems authorized by the OCS Act violates the statute and precludes the continuation of lease sales.

It is the opinion of this Court that there does exist a genuine issue as to whether the statute requires the Secretary to fully promulgate regulations for all bidding systems before leasing activity on the outer continental shelf can take place. Certainly, this is a material fact in dispute which precludes the grant of plaintiffs' motion for partial summary judgment. Accordingly, the motion for partial summary judgment will be denied.

IV. *The Motion for Preliminary Injunction*

Plaintiffs seek, in the alternative, a preliminary injunction enjoining the September 1980 lease sales. Preliminary injunctive relief is an extraordinary equitable remedy. The law is well settled that the moving party has the burden of demonstrating that (1) he will suffer immediate irreparable injury if the relief is not granted; (2) he has a strong likelihood of succeeding on the merits; (3) a balancing of the equities and maintenance of the status quo favor relief and (4) the public interest will be favored by the grant of such relief. *Virginia Petroleum Jobbers* v. *Federal Power Commission*, 110 U.S. App. D.C. 339, 259 F.2d 921 (D.C. Cir. 1958). The elements will be discussed seriatim.

Irreparable Injury

The plaintiffs contend that they will be irreparably harmed if the Court fails to enjoin the defendants from proceeding with the lease sales scheduled for September 1980 absent the full promulgation of regulations for and implementation of all the alternative bidding systems. At the heart of this injury, plaintiffs allege, is the cash bonus-fixed royalty system which, as employed by defendants in the past,

will cause damage to plaintiffs for it fails to promote proper competition and expeditious development of off-shore energy reserves. To support their arguments, plaintiffs refer to reports submitted in relation to past lease sales. These reports discuss how the cash bonus-fixed royalty bidding system operates and conclude that the system depresses production and competition as well as reduces fair return to the federal treasury. The plaintiffs also rely on reports and statistical data to support their contention that use of the cash bonus-fixed royalty system is designed to discourage the small bidder thereby decreasing competition and ultimately causing injury. Plaintiffs principally rely on the testimony of their expert, George Donkin, whose affidavit states that every sale in which the cash bonus system with a fixed-royalty at one-sixth (1/6) was used, produced a diminishing return to the federal government.

Plaintiffs expound on the negative aspects of the cash bonus-fixed royalty system but fail to demonstrate exactly how they are injured by the failure of defendants to promulgate *all* the regulations. Plaintiffs focus only on how the cash bonus-fixed royalty system is the least favorable system to the public interest and why regulations for and implementation of the variable profit share system will be most favorable.

Injunctions should not issue unless the threat of injury is imminent and well-founded and the injury itself would be incapable of being redressed after a final hearing on the merits. The Court finds that plaintiffs have failed to demonstrate the requisite irreparable injury to them in relation to the scheduled September 1980 sale. The cash bonus system with fixed royalty is not the exclusive method by which

leases are being offered for sale. Moreover, the use of this system is consistent with the intent of Congress to experiment in order to obtain valid data for comparison with the performance of other systems.

Likelihood of Success

Upon consideration of a motion for preliminary injunction, the Court need only consider the likelihood of success on the merits, for adjudication of the merits must await a full hearing. In the instant motion, plaintiffs maintain that the ultimate question for resolution is whether the Department of Interior can continue in the third year after the new statute with exclusive use of cash bonus bidding and even refuse to promulgate the profit share bidding regulations which Congress most wanted to see. Defendants state the issue is whether the OCS Act requires the promulgation of regulations for each of the enumerated bidding systems and submit that even if this is true, the main inquiry is whether the pace of issuing regulations is in accordance with the law.

Plaintiffs rely on the legislative history and the statute to support their contentions. Their arguments, however, merely reflect the intent of Congress to have the Secretary of Interior retreat from the sole and exclusive use of the cash bonus-fixed royalty bidding system and to develop and use other systems which promise to meet the goals and policies of the 1978 Amendments. Plaintiffs urge the Court to find that Congress mandated the use of only non-cash bonus bidding systems in lease sales in order to achieve fair market value. Plaintiffs also appear to suggest that the amendments require bidding systems "other than cash bonus" rather than "in addition to cash bonus."

The OCS Act on its face authorizes four cash bonus bidding systems, including the traditional cash bonus-fixed royalty. There is evidence in the record tending to establish that leases offered under this traditional system may not produce a fair return and indeed may be anti-competitive; however, this evidence was within the knowledge of Congress before its enactment of the statute and the system was nonetheless expressly retained, albeit with limitations, for use during the five-year plan.

Plaintiffs do appear to categorize, as defendants contend, all cash bonus bidding systems under one rubric: cash bonus-fixed royalty. Enumerated in the OCS Act, however, are cash bonus systems with differing royalties which may result in a fair return as previous experience with the sliding scale royalty seems to indicate. It also appears clear from the OCS Act and the legislative history that the Secretary of Interior must report to Congress the *use* and *non-use* of the various bidding options. This may well indicate that even if regulations had been promulgated for all enumerated systems, it cannot be said that the Secretary is abusing his discretion solely because the variable net profit share bidding system is not being utilized in the September 1980 sale. Certainly, the evidence of record does not support such a finding.

Further, the Court is not persuaded that the statute and legislative history clearly prohibit leasing until all the enumerated bidding regulations are promulgated. On the contrary, the statute provides in pertinent part:

> After the leasing program has been approved by the Secretary, or after eighteen months following September 18, 1978, whichever first occurs, no lease shall be issued unless it is for an area

> included in the approved leasing program and unless it contains provisions consistent with the approved leasing program, except *that leasing shall be permitted to continue until such program is approved and for so long thereafter as such program is under judicial or administrative review pursuant to the provisions of this subchapter.* (Emphasis added).

43 U.S.C.A. § 1344(d)(3) (West Supp. 1979). However, the Court is persuaded that under certain circumstances, the leasing program may be subject to further judicial scrutiny notwithstanding the above.

The sale which plaintiffs seek to enjoin constitutes the first sale scheduled under the five-year leasing program. The September sale utilizes over 50% of the enumerated bidding systems and, in addition, does not appear to violate the statutory limitations on the use of cash bonus-fixed royalty bidding. After full consideration, the Court finds and concludes that plaintiffs have failed to clearly demonstrate a strong likelihood of success on the merits.

Balancing the Equities
The Public Interest

Plaintiffs contend that the public interest would be best served by a delay in the lease sales in that injury to the public through reduced revenues and competition would be alleviated. Plaintiffs view any delay resulting from an injunction as necessarily being of short duration as defendants, in their view, have the necessary analyses to promulgate regulations for all systems but are purposefully "stonewalling" apparently to protect certain interests. Defendants, on the other hand, contend that the grant-

ing of a preliminary injunction would unduly delay lease sales and ultimately frustrate the overriding thrust of the entire OCS Act, which is to expedite development of the outer continental shelf. Defendants deny that the delay would be short and maintain that it would work to the detriment of the public interest. First, because of the complexities involved in promulgating regulations for the remaining bidding systems, the delay could be a year or more in length. Secondly, this delay would force the Secretary to compress the enjoined sales into a later period of the five-year plan. Thus defendants argue there is a serious question whether bidders would have the resources to participate in sales appearing in such rapid succession, which in turn could result in declining production and an increased dependence on foreign oil and gas.

In striking a balance between these divergent views, the Court finds and concludes that defendants have not clearly demonstrated that more harm with result to them from a denial of the injunction than will result to defendants from its grant. Further, the Court is convinced that plaintiffs have not clearly demonstrated that the public interest will by served by the issuance of an injunction.

CONCLUSION

Upon consideration of the pleadings, the motion for partial summary judgment or, in the alternative, for preliminary injunction, the opposition thereto, the memoranda of points and authorities submitted by the parties, the argument of counsel, the record, and the reasons stated herein, the Court finds and concludes that the motion of plaintffs should be denied.

WHEREFORE, it is this 17th day of September, 1980,

ORDERED that the motion of plaintiffs for partial summary judgment or, in the alternative, for a preliminary injunction be and hereby is denied.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1633

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL. PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary of Interior, ET AL. DEFENDANTS

[Filed Sep. 17, 1980]

ORDER

Upon consideration of the Defendants' Motion for Summary Judgment, the plaintiffs' opposition to the motion, the arguments of counsel for the parties and the entire record, and the Court being of the opinion that there exists genuine issue as to material facts, which precludes the Court from granting summary judgment, it is therefore this 17th day of September 1980,

ORDERED, that Defendants' Motion for Summary Judgment be, and hereby is, denied.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1768

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL., APPELLANTS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

No. 79-1787

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL., APPELLANTS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

Appeal from the United States District Court for the District of Columbia

(D.C. Civil 79-1633)

Argued October 12, 1979

Decided December 20, 1979

Before: LEVENTHAL* and WALD, *Circuit Judges* and NICHOLS**, *Judge*, United States Court of Claims

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

Concurring opinion filed by *Circuit Judge* WALD.

LEVENTHAL, *Circuit Judge*: In this case we are asked to decide whether the bidding systems currently employed by the Secretary of the Interior in leasing government offshore properties for oil and natural gas development comply with the Outer Continental Shelf Lands Act,[1] as substantially amended in 1978. Appellants challenge two district court orders denying their request to enjoin the Secretary from conducting further lease sales until alternative bidding systems are used. Although we cannot say whether the Secretary is implementing the amendments as expeditiously as possible, we are convinced that he has not contravened the letter of the law. Accordingly, we affirm both orders of the district court.

I. BACKGROUND

Since the enactment in 1953 of the Outer Continental Shelf Lands Act (OCS Act), the federal government has been actively engaged in leasing OCS lands[2] to private companies for the exploration and

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* Judge Leventhal authored this opinion but died before it was released.

** Sitting by designation pursuant to 28 U.S.C. § 293(a).

[1] 43 U.S.C.A. § 1331 *et seq.* (West Supp. 1979).

[2] The term "Outer Continental Shelf" has been defined as all submerged lands lying seaward and outside State waters (three miles), "and of which the subsoil and seabed apper-

development of oil and natural gas deposits. The original act delegated broad authority to the Secretary of Interior for implementing and administering the legislation, but it was uncharacteristically specific with respect to lease bidding procedures. The Secretary was directed to conduct competitive bidding by sealed bids under one of two alternative formulas. He could solicit bids either (a) on the basis of a cash bonus bid with a fixed royalty (fixed at no less than 12½% of the gross revenue of the lease), or (b) by a royalty rate bid with a fixed cash bonus payment.[3] As between these two methods, the Secretary's discretion was not limited. Until recently, virtualy all leases made under the OCS Act were issued through the cash bonus-fixed royalty alternative, with the royalty set in advance of bidding at 16⅔% (one-sixth) of the gross value of the production.[4] Under that procedure, a lease would be awarded to the responsible qualified bidder with the highest cash bid on a given tract, assuming the bid was deemed to provide an adequate return to the government on the tract.

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tain to the United States and are subpject to its jurisdiction and control." 43 U.S.C. § 1331(a). With few exceptions, most OCS leasing to date has involved tracts in the Gulf of Mexico. Only recently has the government opened to bidding the "frontier areas" in the Pacific and Atlantic Oceans. *See generally* H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 65-74 (1977).

[3] 43 U.S.C. § 1337(a) (1976).

[4] Between the original passage of the OCS Act and the initiation of this action, the Secretary had conducted 47 oil and gas lease sales in which 3,450 leases had been awarded. *See* Joint Appendix (J.A.) at 179.

Several critical events during the mid-1970s necessitated a massive revision of the OCS Act.[5] Most prominently, the nation's increasing dependence on foreign sources of energy, laid bare by the oil embargo of 1973, caused many in government to turn to the Outer Continental Shelf as a potential, though unproven, supply of American short-range energy needs. At the same time, the prospects of greater offshore oil and gas production—and the increased consciousness of environmental protection concerns—spurred local governments and environmental groups to seek a greater role in regulating future OCS ventures.

Other developments more directly pointed to inadequacies in the bidding system used in leasing OCS lands. The dramatic increases in the price of oil and natural gas made it evident that the cash bonus-fixed royalty system of bidding led to a situation wherein the total royalties paid to the government were declining as a percentage of gross proceeds on wells. Several reports issued by the Comptroller General beginning in 1975 expressed the strong reservation that the cash bonus-fixed royalty system could not assure the government a fair return on its leases.[6] In addition, those reports indicated that the cash bonus system had anticompetitive effects, leaving smaller operations, with fewer financial resources, relatively unable to compete, given the high front-end cash bonus payments and the many uncertainties associated with exploring untested areas. The

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[5] *See generally* H.R. Rep. No. 95-590, 95th Cong., 1st Sess. (1977).

[6] *See id.* at 110-11; S. Rep. No. 95-284, 95th Cong., 1st Sess. 60-68 (1977); J.A. 47-50.

Interior Department's own experimentation on two occasions with the alternative system, royalty bidding, seemed to confirm that cash bonus-fixed royalty bidding did not generate sufficient competition nor produce adequate returns to the government.[7]

Congress responded to the divergent stimuli for reform with the comprehensive Outer Continental Shelf Lands Act Amendments of 1978. These amendments reflect the often competing concerns for environmental protection, cooperation among all interested parties, and the acceleration of OCS oil and gas development. Most provisions of the amendments have no bearing on the case before us; a few, however, are central to this appeal. Congress expressly retained the two bidding systems previously authorized, but it added five other specific alternatives as well as any non-enumerated system the Secretary determines to be useful to accomplish the purposes and policies of the amendments.[8] The Secretary of Interior retains

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[7] *See* H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 138-39 (1977).

In testimony before Congress, then-Secretary of the Interior Rogers Morton conceded that fair market value might not be obtained by cash bonus leases in light of escalating prices:

> [O]n the Outer Continental Shelf, we have been collecting 16-2/3 percent of all of the production. You might say, and I think very well say, this is not a high enough percent because we really don't get true value, if, at the time the bonus is bid, oil is selling at $5 and then it goes up to $10. The 16-2/3 percent royalty is not high enough. We are examining that.

Hearings on S. Res. 45 and S. Res. 222 Before the Senate Committee on Interior and Insular Affairs and the Senate Committee on Commerce, 94th Cong., 1st Sess. 68 (1975).

[8] 43 U.S.C.A. § 1337(a)(1) (West Supp. 1979).

his discretion in selecting among alternative bidding systems, though he is restrained to some extent by percentage limits on the use of certain systems.[9] In addition, although the Interior Secretary is to conduct all lease sales under the Act, it is the Secretary of the Department of Energy who, in consultation with the Interior Secretary, must promulgate regulations governing the use of each particular new bidding system.[10] The Secretary of Energy annually, and the Interior Secretary with each lease sale, must report to Congress concerning the use and nonuse of the various OCS bidding options.[11] Finally, a new section was added to the OCS Act requiring the Secretary of Interior to prepare and maintain a comprehensive oil and gas leasing program to implement the different policies of the Act.[12] That program must adhere to several principles spelled out in the statute, including a balanced consideration of economic, social and environmental concerns and the as-

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[9] 43 U.S.C.A. §§ 1337(a)(1), (a)(5)(B) (West Supp. 1979). Section 8(a)(5)(B) of the OCS Act requires the Secretary to use alternatives other than cash bonus-fixed royalty bidding on 20-60% of all acreage offered for leasing each year and for the next five years.

[10] Under Section 302(b)(2) of the Department of Energy Organization Act, 91 Stat. 578, 42 U.S.C. § 7101 *et seq.*, the responsibility of the Secretary of the Interior to promulgate regulations implementing OCS alternative bidding systems was transferred to the Secretary of Energy. 42 U.S.C.A. § 7152 (b)(2) (West Supp. 1979). *See* H.R. Rep. No. 95-1474, 95th Cong., 2nd Sess. 77-78, 90 (1978) (conference report).

[11] *See* 43 U.S.C.A. §§ 1337(a)(8)(9), 1343(2) (West Supp. 1979).

[12] *Id.* at § 1344.

surance of a fair market value on leased land to the government.[13]

This litigation grows out of the Interior Secretary's continued partial use of the cash bonus-fixed royalty bidding system. Between the effective date of the OCS Act amendment[14] and the date on which this lawsuit was filed, three OCS lease sales were conducted. In each instance the Secretary chose cash bonus-fixed royalty bidding for part of the tracts to be leased, while using another bidding system—a cash bonus system with a fixed non-linear (semi-logarithmic) sliding scale royalty[15]—for the other tracts. Four other lease sales, scheduled to take place between June and November of 1979, planned to utilize the same mix of alternative bidding systems. Bids on the first of these, Lease Sale 48, were scheduled for opening on Friday, June 29, 1979.

Appellants, consisting of nine consumer organizations, three private citizen-taxpayers, and two California governmental entities,[16] commenced this liti-

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[13] *Id.* at § 1344(a).

[14] The amendments became effective on September 18, 1978.

[15] Under this system the lessee pays a percentage royalty on a schedule fixed in advance by the Secretary in which the payment percentage increases as the scale of production increases.

[16] The fourteen appellants are: Energy Action Educational Foundation; Consumer Federation of America; Consumer Energy Council of America; Michigan Citizens Lobby; Arkansas Consumer Research, Inc.; Service Employees International Union; International Association of Machinists; Citizen/Labor Energy Coalition; Texas Consumer Association; M. James Doling; Paul Casagrande; Kathleen F. O'Reilly; California State Lands Commission; and the City of Long Beach, California.

gation in the District Court for the District of Columbia on June 22, 1979. Naming the United States, the Secretary of Interior, and the Secretary of Energy as defendants, appellants sought declaratory and injunctive relief leading to the suspension of all OCS leasing "until the Secretary of Energy has promulgated regulations governing the use of all alternative bidding systems authorized in [the OCS Act], as amended, including systems allowing for the sharing of net profits." [17] Appellants also asked for an injunction against further leasing under the cash bonus-fixed (16⅔%) royalty as well as a full investigation of existing leases and corrective action should it be demonstrated that they will not yield a fair return to the government.

The essence of appellant's complaint is that cash bonus-fixed royalty bidding, particularly with the royalty fixed at 16⅔%, cannot yield fair market value nor generate adequate competition as mandated by the amended OCS Act. Only through the issuance and use of regulations authorizing alternative systems, most notably the profit-sharing options, can the government achieve the statutory objectives. However, according to appellants, issuance of those regulations has been unduly delayed by a "jurisdictional squabble" between the Departments of Energy and the Interior.[18]

On June 25, 1979, four days prior to the scheduled opening of bids on Lease Sale 48, appellants filed a motion for a preliminary injunction seeking to prevent further lease sales "in the absence of regulations establishing the full range of bid systems man-

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[17] J.A. 76.

[18] Pet. Br. at 3, 13-14.

dated by the Outer Continental Shelf Lands Act." [19] A hearing on the motion was held on June 27. Later that day, District Judge Aubrey E. Robinson, Jr., denied appellant's preliminary injunction motion. In its Memorandum and Order, the district court ruled that plaintiffs had not shown a likelihood of prevailing on the merits.[20] The stautory scheme laid out in the 1978 amendments was not violated in lease sales subsequent to their enactment. To the contrary, the court found that the Secretary's partial use of the cash bonus-fixed royalty system complied full with the statutory requirement that a mix of that system with others be used and could not be found to violate the purposes of the OCS Act. The court further determined that the defendants had not acted arbitrarily or capriciously in failing to promulgate regulations as yet regarding some of the alternative bidding systems "in light of the complexity and sensitivity involved in preparation of such regulations." [21] Finally, the court found adequate safeguards against improper use of bidding options in the Congressional oversight scheme incorporated in the Act.

Appellants did not appeal this order but on June 28 moved for modification of that order so as to restrain the defendants from awarding cash bonus-fixed royalty leases under Sale 48.[22] The next day, as sched-

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[19] J.A. 129.

[20] J.A. 293.

[21] J.A. 294.

[22] J.A. 296. This request was rendered moot by appellees' representation that by statute awards would be delayed at least 30 days in order to afford the Attorney General an opportunity to conduct a review of the sale's competitive effects. J.A. 306 n.1.

uled, the Secretary opened Sale 48 bids. Shortly thereafter, the appellants again filed a motion seeking modification of the June 27 order, maintaining that the results of bidding on Lease Sale 48 indicated that acceptance of the bids would contravene the fair market value and competition requirements of the OCS Act. In a brief order, the district court denied this motion, reasoning that appellants had "still failed to show that utilization of the cash bonus-fixed bidding system with a 16⅔% fixed royalty violates the Outer Continental Shelf Lands Act." [23]

This appeal, expedited as required by statute,[24] ensued. Both the district court and this court denied applications for a stay pending appeal of the Secretary's award of leases under Sale 48.

II. ANALYSIS

To some extent the procedural posture of this case narrows our scope of review. This court has often observed that the grant or denial of a preliminary injunction motion normally lies within the discretion of the trial judge. An appellate court's review is limited to determining whether the district judge abused his discretion, "or rested his analysis upon an erroneous premise." [25] Nevertheless, when the district court's action rests on an interpretation of

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[23] J.A. 549.

[24] 43 U.S.C.A. § 1349(d) (West Supp. 1979).

[25] A Quaker Action Group v. Hickel, 137 U.S.App.D.C. 176, 180, 421 F.2d 1111, 1115 (1969). *See also* National Ass'n of Greeting Card Publishers v. U.S. Postal Service, 186 U.S.App.D.C. 331, 363, 569 F.2d 570, 602 (1976); Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 10, 458 F.2d 827, 832 (1972).

the applicable law, that interpretation is reviewable fully and *de novo* in the appellate court.[26] Inasmuch as the district judge drew support from his reading of the OCS Act amendments, we are compelled to examine the meaning of the statute.

It cannot be gainsaid that Congress was deeply concerned with the assurance of fair market value and adequate competition in OCS leasing. Both the legislative history[27] and the 1978 amendments themselves[28] address those interests. Furthermore, it may well be that cash bonus-fixing royalty bidding is less likely to maximize those aims and that, conversely, profit-sharing or other alternative bidding systems might be more successful in that regard.[29] In addition, we can assume, *arguendo*, the accuracy of appellants' assertion that the emergence of profit-shar-

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[26] Delaware & Hudson Ry. Co. v. United Transportation Union, 146 U.S.App.D.C. 142, 159, 450 F.2d 603, 620 (1971).

[27] *See, e.g.*, H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 47, 54 (1977); S. Rep. No. 95-284, 95th Cong., 1st Sess 43, 46, 47 (1977); J.A. 51-56.

[28] *See, e.g.*, 43 U.S.C.A. §§ 1332(3), 1337(c), 1343, 1344(a)(4), (d), 1802(2) (West Supp. 1979).

[29] Appellants amassed substantial evidence to demonstrate the superiority of a profit-sharing bidding system over the cash bonus-fixed royalty option. They pointed to the successful experience with profit-sharing of other oil and natural gas lessors, such as the State of California and several foreign countries. J.A. 39-44. They also found support in the government's own experiences with alternative systems and its many concessions that a profit-sharing system could best assure the receipt of fair market value and competition for tracts. J.A. 40-41, 46, 52-53, 68-69. This evidence did not escape the legislators' purview. *See* S. Rep. No. 95-284, 95th Cong., 1st Sess. 73 (1977).

ing regulations has been hampered by inter-agency disputes.[30] Nonetheless, bearing in mind the competing policies underlying the amendments and the explicit language of the revisions, the real question before us is whether the continued partial use of cash bonus-fixed royalty bidding—as planned for the near future by the Secretary—violates the statutory scheme. We hold that it does not.

Congress enacted the provisions dealing with lease bidding after exhaustively reviewing the Secretary's 25-year record of administering the OCS Act. It cannot be doubted that Congress had the opportunity to discard the cash bonus-fixed royalty system or to restrain the Secretary's discretion in according it substantial use. In essence, it chose to do neither.

Congress declined to omit cash bonus-fixed royalty bidding when it rewrote § 8(a) of the OCS Act. That section continues to provide that lease bidding, "at the *discretion* of the Secretary," may be on the basis of cash bonus-fixed royalty bidding or fixed bonus-variable royalty bidding.[31] Other bidding options were added to the list, though authorizing regulations for those systems must be promulgated in advance of their use.

But Congress did not stop there. The Secretary's discretion in choosing among alternative bidding systems was limited in one crucial respect. Elsewhere in that section, at § 8(a)(5)(B), Congress mandated

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[30] The government does not deny the basic thrust of this assertion which had its root in a June 4, 1979 report of the General Accounting Office entitled, "Federal Leasing Policy—Is the Split Responsibility Working?" The full report appears at J.A. 154-72.

[31] 43 U.S.C.A. § 1337(a)(1) (West Supp. 1979) (emphasis added).

that cash bonus-fixed royalty bidding be utilized in a large percentage of leases. According to the express terms of the provision:

> The bidding systems [other than cash bonus-fixed royalty bidding] shall be applied to not less than 20 per centum and not more than 60 per centum of the total area offered for leasing each year during the five-year period beginning on [the date of the enactment of this section].[32]

Stated differently, Congress affirmatively intended that subsequent to passage of the amendments, cash bonus-fixed royalty bidding was to be used in at least 40% of all leases each year for five years. The only limitation put on use of this option was that it should not be used for more than 80% of the leases.

The legislative reports accompanying the amendments also reveal Congress's intent to preserve the cash bonus-fixed royalty bidding option. Congress sought experimentation among bidding systems, usually through direct comparisons between cash bonus-fixed royalty bidding and other options, in order to obtain reliable information as to the relative advantages and disadvantages of the enumerated systems. It was hoped that this testing would ultimately enable the Secretary to utilize the system or mix of options which emerged as superior. The House conference report notes:

> Although there is no requirement for random selection, the Secretary, in setting forth systems for use on tracts, shall seek to secure a fair selection of different methods on different tracts. The purpose of such a selection is to assure that

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[32] 43 U.S.C.A. § 1337(a)(4)(B) (West Supp. 1979).

> adequate information is obtained as to relative advantages and disadvantages of the various bidding systems, including the front-end bonus bid systems, as applied to different types of tracts.[33]

The lease sales under attack in this case independently and taken together fall well within the percentages required by § 8(a)(5)(B). One-half of the tracts to be leased in Lease Sale 48 were offered on a cash bonus-fixed royalty basis, with the other half solicited on a cash bonus-sliding scale royalty basis. In the public notice announcing Sale 48, the Secretary stated that the bidding plans were designed to facilitate a "valid statistical analysis."[34] Similarly, the announcement for Lease Sale 48, held on July 30, 1979, noted that both systems would again be employed for experimental purposes.[35]

The foregoing makes plain enough Congress's intention that cash bonus-fixed royalty bidding be used widely, and in conjunction with use of other systems. The amendments and legislative reports are replete with other indicia demonstrating that Congress contemplated its continued use as well as delays in the implementation of alternative systems. The statute requires that regulations implementing the new systems be promulgated in advance of their use.

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[33] H.R. Rep. No. 95-1474, 95th Cong., 2nd Sess. 92 (1978). *See also* H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 54 (1977); S. Rep. No. 95-284, 95th Cong., 1st Sess. 47 (1977).

[34] 44 Fed. Reg. 30,779 (May 29, 1979).

[35] 44 Fed. Reg. 37,993 (June 30, 1979).

In the first two lease sales of 1979, systems other than cash bonus-fixed royalty bidding were used in 37% of the total acreage offered. J.A. 238.

Toward that end, the Secretary of Energy is required to consult with the Interior Secretary.[36] Just this year the House Committee noted with disapproval that the new regulations could take up to two years to issue.[37] Even the June 1979 GAO report, which appellants use to document their claim of the Energy-Interior jurisdictional battles, reccomends that regulations covering alternative bidding systems be issued "no later than January 1, 1981." [38] We are informed that proposed regulations governing three bidding options—the two systems previously authorized under the original OCS Act and cash bonus-sliding scale royalty bidding which had been employed on an experimental basis —were issued on July 26, 1979.[39] Regulations governing bidding under a profit-sharing system, the option most heavily favored by appellants, must precede notice of a sale by 90 days.[40] Although when pressed at oral argument appellees could not promise a date by which profit-sharing regulations will emerge, they have given repeated assurances that the regulations have been returned to the Department of Energy from Interior and should be out "in the near future."

The legislative scheme also contains an elaborate system of interdepartmental consultation and inter-

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[36] 43 U.S.C.A. § 1337(a) (West Supp. 1979); *see* note 10, *supra*.

[37] *See* H.R. Rep. No. 95-1835, 95th Cong., 2nd Sess. 25 (1979).

[38] J.A. 171 (emphasis added). The Comptroller General went on to note that "once Energy's regulations are finalized on January 1, 1981," the Secretary of the Interior should "issue by March 1, 1981, Interior's own regulations which are consistent with Energy's." J.A. 171-72.

[39] Govt. Br. at 22.

[40] 43 U.S.C.A. § 1337(a)(6) (West Supp. 1979).

governmental coordination for various purposes. For example, the Attorney General, in consultation with the Federal Trade Commission, is accorded a 30-day period in which to review the competitive effects of bids under each lease sale.[41] The section on bidding systems in the annual report on leasing and production is also to be prepared in consultation with the Attorney General.

That Congress was aware of potential delays in implementing the amendments appears from Section 18 of the OCS Act, added in 1978.[42] Section 18 mandates the preparation of a comprehensive oil and gas leasing program in accordance with the policies of the OCS Act. Congress gave the Secretary nine months from the date of enacting the amendments to prepare the plan before submitting it to Congress, the Attorney General, and the governors of states affected by lease sales.[43] In addition, the Secretary must allow 90 days for receiving comments on the plan, and must submit the program and comments to Congress and the President 60 days before approving it.[44] More important, Congress made it clear that leasing was to continue until the comprehensive leasing program became operational. Section 18(d)(3) expressly provides:

> After the leasing program has been approved by the Secretary, or after eighteen months following September 18, 1978, whichever first occurs,

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[41] *Id* at § 1337(c).

[42] *Id.* at § 1344.

[43] *Id.* at § 1344(c)(3). It is our understanding that the Secretary's plan was timely filed in April 1979.

[44] *Id.* at § 1344(d)(1), (2).

> no lease shall be issued unless it is for an area included in the approved leasing program and unless it contains provisions consistent with the approved leasing program, except that *leasing shall be permitted to continue until such program is approved* and for so long thereafter as such program is under judicial or administrative review pursuant to the provisions of this subchapter.[45]

The House report reiterated the clear meaning of that subsection:

> [T]he committee also realized that to prepare a program in conformity with this Act might take up to 18 months, and that leasing should continue during this time. There is intended to be no delay or interruptions in lease sales. During the period of time that the proposed leasing program is being considered and determined, leasing is to continue as heretofore. . . . If the approved leasing program is under judicial challenge, leasing can continue until judicial review is complete.[46]

Thus, Congress did not expect changes to take place overnight. To the contrary, it fully anticipated that an optimal comprehensive leasing plan took time —as much as 18 months or longer—to become opera-

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[45] *Id.* at § 1344(d)(3).

[46] H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 151 (1977). *See also id.* at 48 ("While a new leasing program is being prepared and promulgated, leasing activities are to continue."): S. Rep. No. 95-284, 95th Cong., 1st Sess. 76-77 (1977).

tional. Accordingly, it drafted a detailed schedule for instituting the program, placing outside time limits on the completion of each stage. With these thoughts in mind it is difficult to find a legislative mandate to support appellants' forth-right contention that the continued use of the cash bonus-fixed royalty system and delay in issuing profit-sharing regulations are inconsistent with the 1978 amendments.

Appellants base their case on the "unless clause" of subsection 8(a)(5)(B). That subsection mandates the use of bidding systems other than cash bonus-fixed royalty bidding for 20-60% of all leasing "unless the Secretary determines that the requirements set forth in this subparagraph are inconsistent with the purposes and policies of this subchapter." [47] Appellants interpret this clause to permit the Secretary to use systems other than cash bonus-fixed royalty bidding, such as profit-sharing, in *all* lease sales. Appellees, on the other hand, maintain that this subsection enables the Secretary to use cash bonus-fixed royalty bidding in all leasing. The legislative reports contain conflicting signals. Both earlier reports supported the government's reading of the clause. The Senate report, for example, saw the clause as an "escape-hatch" to compliance with the mandate to use other systems, in recognition of the fact that "there could be administrative problems involved in implementing new concepts and procedures." [48] Both houses expressed concern that compliance with the percentage limits might unduly retard OCS development.

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[47] 43 U.S.C.A. § 1337(a)(5)(B) (West Supp. 1979).

[48] S. Rep. No. 95-284, 95th Cong., 1st Sess. 73 (1977). *See also* H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 139 (1977).

The conference report, however, supports appellants' view. Though it retains a hint that the clause was designed to permit full use of cash bonus-fixed royalty bidding,[49] the report states directly that the percentage limits could be waived in *either* direction:

> The Secretary of the Interior is given the discretion to waive the *minimum or maximum* requirement for the use of bidding systems other than bonus bidding, based on a determination that *either* the minimum or maximum percentage level is not consistent with the purposes and policies of the act.[50]

Assuming, as we do, that subsection 8(a)(5)(B) sets limits which can be waived in either direction in appropriate cases, by the Secretary within his discretion, appellants argue next that this discretion has been abused. It is appellants' position that § 8(a)(5)(B) is qualified—and thus the Secretary's discretion is constrained—by the mandatory requirement of § 18(a)(4) that the leasing program be prepared and maintained in a manner consistent with the principle that:

> Leasing activities shall be conducted to assure receipt of fair market value for the lands leased

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[49] The report discusses a requirement in the statute that the Secretary explain "why the bonus bid system was used or is to be used in *more than* 60 per cent of the areas actually leased," without reference to the situation in which cash bonus bidding would be used in less than 40% of tracts bid. H.R. Rep. No. 95-1474, 95th Cong., 2nd Sess. 93 (1978) (conference report) (emphasis added).

[50] *Id.*

and the rights conveyed by the Federal Government.[51]

As was virtually conceded by appellants at oral argument, the fair market value requirement of § 18(a)(4), appearing in the new section dealing with the comprehensive five-year leasing program, does not come into play until the comprehensive leasing program is ultimately approved.[52] It is our understanding that the Secretary's program applies to lease sales commencing in March 1980 and does not affect those under challenge in the present suit. In the meantime, the appropriate standard appears to be that leases must insure a "fair and equitable return." [53]

We need not explore the difference, if any, between these two standards. Nor need we decide which of the two is currently operative. For we cannot find on the basis of the record before us that the lease sales involved in this case violate either formulation. For this reason, we cannot conclude that the district judge abused his discretion when he determined that appellants "failed to show that utilization of the cash bonus-fixed bidding system with a 16⅔% fixed royalty violates the purposes underlying the Act." [54]

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[51] 43 U.S.C.A. § 1344(a)(4) (West Supp. 1979). Appellants also argued that the Secretary's discretion was checked by provisions concerning the pro-competitive purposes of the amendments, see note 28, *supra*.

[52] Not surprisingly the conference report discusses the fair market value concern only in connection with its analysis of § 18.

[53] 43 U.S.C.A. § 1802(2)(c) (West Supp. 1979).

[54] J.A. 294.

The trial judge relied on evidence offered by the government which sought to prove that the contested lease sales complied with the OCS Act. Although contrary evidence was introduced by appellants, there was a basis for believing that a 16⅔% royalty was warranted on these particular leases of "frontier" OCS lands.[55] The risk and uncertainties inherent in leasing these remote, unproven properties all but nullifies the impact of appellants' comparisons of these sales to those held by California or foreign governments. We recognize further that it is for the agency to weigh the evidence initially and we must restrain from interfering with a rational agency determination which is supported by substantial evidence.[56]

The district court ruling is fortified by additional factors. As the trial court noted, the public interest is protected by various Congressional oversight mechanisms incorporated into the OCS Act. Yet rather than express displeasure with the post-amendments administration of the leasing program, Congress recently merely took note of the schedule for implementing leasing regulations in the years ahead.[57] This observation reinforces our conclusion expressed earlier that Congress plainly intended leasing to continue in the interim. Significantly, although several major developments coalesced to warrant the massive overhaul of the OCS Act in 1978, conditions

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[55] *See* H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 94 (1977).

[56] *See* County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1383 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

[57] H.R. Rep. No. 95-1835, 95th Cong., 2nd Sess. 25 (1979).

have changed relatively little since passage of the amendments. We see no occasion yet to say that the Secretary was under a duty to use the "escape hatch" in order to deviate from the basic plan laid out in the amended Act.

We also cannot be oblivious to the many often conflicting policies and purposes underlying the OCS Act amendments. Though the attainment of competition and fair market value were of undoubted concern to the legislators, their primary interests lay in insuring expeditious oil and gas development in a manner consistent with environmental protection.[58] It should come as no surprise that a scheme which mandates experimentation among alternative systems should on occasion fall short of perfection in achieving some legislative goals.[59]

Thus far, the district court has only denied a preliminary injunction. At a trial on the merits, the district court is free to consider the case in the light of intervening developments. It can reconsider all matters raised in the motion for preliminary injunctive relief. It may also explore several matters not previously before it. For example, it could examine

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[58] *See* H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 53 (1977) ("The basic purpose of [the OCS Act amendments] is to promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf."); S. Rep. No. 95-284, 95th Cong., 1st Sess. 42-43 (1977).

[59] In discussing the procedures for utilizing the various bidding systems, the Senate report conceded:

> These alternatives may not be the "perfect solution." However, they . . . are certainly worth trying on an experimental basis.

S. Rep. No. 95-284, 95th Cong., 1st Sess. 47 (1977).

the Secretary's reasons for using cash bonus-fixed royalty bidding on as much as 50% of the tracts bid, rather than on some lesser basis still falling within the statutory guidelines. Or it might consider more directly than it had occasion to previously whether the 16⅔% royalty fixed by the Secretary for cash bonus bidding is unduly low. Lastly, at some point in time the Secretary's delay in issuing profit-sharing regulations and in failing to experiment among alternative bidding systems more widely may constitute a violation of the OCS Act amendments. We can not say on this record that the government's actions to date have run afoul of the legislative scheme.

In view of the Secretary's endeavor, and the national interest, to expedite exploration under leases, we think it appropriate to observe that although technically the district court has latitude to retroactively remedy those sales already concluded (should it reverse its earlier inclination), on the facts before us it is unlikely that such a course would constitute a sound exercise of judicial discretion. The district court would be required to balance the harm to appellants against that suffered by the government and the successful bidders in the completed lease sales. If the Secretary is forced to reschedule completed sales the attendant disruption of OCS development would surely disserve priorities set by Congress. All previously successful bidders would find wasted the enormous outlays of capital they invested in prior bidding, and all would be disadvantaged by the public disclosure of their original bids. Furthermore, the government, and derivatively the public, would be injured by this prior disclosure, thereby destroying the essence of secret bidding procedures.

Affirmed.

WALD, *Circuit Judge, concurring*: I concur in Judge Leventhal's opinion but write separately to underscore a few points of extreme importance in this case, which may be considered in the course of any trial on the merits.

The 1978 amendments to the Outer Continental Shelf Lands Act aimed at comprehensive reform of traditional oil leasing practices of the United States. The legislators were motivated to act by their concern that the nearly exclusive use of the traditional cash bonus-fixed royalty bidding system was not operating in the best interest of the public. They fixed three goals in the new Act relevant here, goals which in practice might conflict but which they expected to be accommodated by the Secretary of Interior's discretion; a system of leasing which would provide fast, efficient exploitation of our energy resources, a fair market value return for the people of the United States, and improved competition among the lessees. The Act clearly envisioned *prompt* experimentation with a variety of methods of leasing to see which would best operate in practice to meet all three goals. 43 U.S.C. § 1337(a)(1). A few of these methods had been tried sporadically under the old Act. Others, primarily the profit sharing option, showed promise but had never been tried by the United States. The statute specifically required the Secretary of the Interior to develop and submit to Congress a comprehensive 5-year leasing program within nine months after the Act became effective, 43 U.S.C. § 1344(c)(3), and it is a fair inference that Congress intended he should be able to pick and choose between the various leasing methods authorized in the new Act as soon as possible after the plan was approved in order to "assure receipt of fair

market value for the lands leased." § 1344(a)(4). In the course of this experimentation, considerable discretion would be necessarily vested in the Secretary to balance a variety of goals and policies. But by the very terms of the Act no meaningful experimentation can begin until the regulations under which the new leasing methods will operate have been promulgated. Defendants' immediate responsibility is to promulgate the necessary regulations as rapidly as possible in order to implement Congress' reform goals.*

An important trust has been given to the defendants here, since through inordinate delay the entire purpose of the Act could be frustrated and in the meantime, according to disturbing estimates submitted by the plaintiffs, the government and ultimately the taxpayers may be losing hundreds of millions of dollars in future revenues with each sale. There are also troublesome indications in this record that the delay which has already occurred is due not only to the complexity of the defendants' task in promulgating new regulations, but to a jurisdictional squabble between agencies over control of the process of leasing our offshore oil and gas fields.

The majority opinion, in which I concur, concludes that at this time and in this posture of the case, the Secretary of Interior has not contravened "the letter of the law." Nevertheless, the time may be approaching when the Secretary, by continuing to grant leases without utilization of the panoply of experimental

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* On December 6, 1979, just prior to issuance of this opinion, a notice of proposed rulemaking was published, inviting comment and announcing hearings on regulations to cover one new bidding method: cash bonus bidding—fixed net profit sharing. 44 Fed. Reg. 70,390 (1979).

bidding systems authorized by the Act, is frustrating the essential experimental purpose of the Act and thus abusing the discretion which has been granted him. At this point, on this record, the delay is not clearly unreasonable, but the more sales of leases which are held without promulgation of the new regulations which are necessary before the congressionally-mandated program of reform can get underway, the more unreasonable the delay appears. As the Court's opinion points out in its concluding paragraph, leases once submitted for bids, much less granted, are virtually impossible to withdraw, no matter how detrimental to the public interest they turn out to be. Certainly these new bidding procedures are complicated, but our energy program is a matter of the highest priority, and the new Act was passed well over a year ago.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. (Supp. II) 7152(b) provides in relevant part:

> (b) There are transferred to, and vested in, the Secretary [of Energy] the functions of the Secretary of the Interior to promulgate regulations under the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.], the Mineral Lands Leasing Act [30 U.S.C. 181 et seq.], the Mineral Leasing Act for Acquired Lands [30 U.S.C. 351 et seq.], the Geothermal Steam Act of 1970 [30 U.S.C. 1001 et seq.], and the Energy Policy and Conservation Act [42 U.S.C. 6201 et seq.], which relate to the—
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> > (1) fostering of competition for Federal leases (including, but not limited to, prohibition on bidding for development rights by certain types of joint ventures);
> >
> > (2) implementation of alternative bidding systems authorized for the award of Federal leases;
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> * * * * *

2. 43 U.S.C. (Supp. II) 1337 provides in relevant part:

> (a)(1) The Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease or submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of subsection (a) of section

1335 of this title. Such regulations may provide for the deposit of cash bids in an interest-bearing account until the Secretary announces his decision on whether to accept the bids, with the interest earned thereon to be paid to the Treasury as to bids that are accepted and to the unsuccessful bidders as to bids that are rejected. The bidding shall be by sealed bid and, at the discretion of the Secretary, on the basis of—

(A) cash bonus bid with a royalty at not less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold;

(B) variable royalty bid based on a per centum in amount or value of the production saved, removed, or sold, with either a fixed work commitment based on dollar amount for exploration or a fixed cash bonus as determined by the Secretary, or both;

(C) cash bonus bid, or work commitment bid based on a dollar amount for exploration with a fixed cash bonus, and a diminishing or sliding royalty based on such formulae as the Secretary shall determine as equitable to encourage continued production from the lease area as resources diminish, but not less than 12½ per centum at the beginning of the lease period in amount or value of the production saved, removed, or sold;

(D) cash bonus bid with a fixed share of the net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(E) fixed cash bonus with the net profit share reserved as the bid variable;

(F) cash bonus bid with a royalty at no less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold and a fixed per centum share of net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(G) work commitment bid based on a dollar amount for exploration with a fixed cash bonus and a fixed royalty in amount or value of the production saved, removed, or sold; or

(H) subject to the requirements of paragraph (4) of this subsection, any modification of bidding systems authorized in subparagraphs (A) through (G), or any other systems of bid variables, terms, and conditions which the Secretary determines to be useful to accomplish the purposes and policies of this subchapter, except that no such bidding system or modification shall have more than one bid variable.

* * * * *

(4)(A) The Secretary of Energy shall submit any bidding system authorized in subparagraph (H) of paragraph (1) to the Senate and House of Representatives. The Secretary may institute such bidding system unless either the Senate or the House of Representatives passes a resolution of disapproval within thirty days after receipt of the bidding system.

* * * * *

(5)(B) The bidding systems authorized by paragraph (1) of this subsection, other than the system authorized by subparagraph (A), shall be applied to not less than 20 per centum and not more than 60 per centum of the total area offered for leasing each year during the five-year period beginning on September 18, 1978, unless the Secretary determines that the requirements set forth in this subparagraph are inconsistent with the purposes and policies of this subchapter.

* * * * *

(9) Within six months after the end of each fiscal year, the Secretary of Energy, in consultation with the Secretary of the Interior, shall report to the Congress with respect to the use of various bidding options provided for in this subsection. Such report shall include—

* * * * *

(D) if applicable, the reason why a particular bidding system has not been or will not be utilized; and

(E) if applicable, the reason why more than 60 per centum or less than 20 per centum of the area leased in the past year, or to be offered for lease in the upcoming year, was or is to be leased under the bidding system authorized by subparagraph (A) of paragraph (1) of this subsection.

(b) An oil and gas lease issued pursuant to this section shall—

(1) be for a tract consisting of a compact area not exceeding five thousand seven hundred and sixty acres, as the Secretary

may determine, unless the Secretary finds that a larger area is necessary to comprise a reasonable economic production unit;

(2) be for an initial period of—

(A) five years; or

(B) not to exceed ten years where the Secretary finds that such longer period is necessary to encourage exploration and development in areas because of unusually deep water or other unusually adverse conditions,

and as long after such initial period as oil or gas is produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon;

(3) require the payment of amount or value as determined by one of the bidding systems set forth in subsection (a) of this section;

* * * * *

3. 43 U.S.C. (Supp. II) 1343 provides in relevant part:

Within six months after the end of each fiscal year, the Secretary shall submit to the President of the Senate and the Speaker of the House of Representatives the following reports:

* * * * *

(2) A report prepared after consultation with the Attorney General, with recommendations for promoting competition in the leasing of outer Continental Shelf lands, which shall include any recommendations or findings by the Attorney General and any

plans for implementing recommended administrative changes and drafts of any proposed legislation, and which shall contain—

(A) an evaluation of the competitive bidding systems permitted under the provisions of section 1337 of this title, and, if applicable, the reasons why a particular bidding system has not been utilized;

(B) an evaluation of alternative bidding systems not permitted under section 1337 of this title, and why such system or systems should or should not be utilized;

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 338475 264

Office-Supreme Court, U.S.
FILED
JUN 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1464

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners

v.

ENERGY ACTION EDUCATIONAL FOUNDATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

PETITION FOR CERTIORARI FILED FEBRUARY 27, 1981.
CERTIORARI GRANTED APRIL 6, 1981.

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RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
(T) 09-18-80	Copies of notice of appeal and District Court docket entries (n-3)
(T) 09-18-80	Docket fee was paid in the District Court on 9/18/80
(T) 09-19-80	4-Appellants' motion for scheduling of expedited oral argument (p-19)
(T) 09-23-80	Certified Original Record (3 volumes); 4 volumes of transcript (under separate cover); 1 deposition; and 3 brown expandable folders of exhibits (n-3)
(T) 09-23-80	Certified Original Supplemental Record (no transcript) (n-3)
(T) 09-23-80	Per Curiam order granting appellants' motion for scheduling of expedited oral argument and this case will be heard at oral argument on Friday, September 26, 1980 at 2:00 pm; the parties are directed to file simultaneous briefs on the merits no later than 1:00 pm on Thursday, September 25, 1980; CJ Wright; Wald and Mikva (who did not participate), CJs
(T) 09-25-80	15-Appellants' brief (p-25)
(T) 09-25-80	7-Affidavit of James A. Joseph (p-25)
(T) 09-25-80	4-Appellants' motion to dispense with printing of record (p-24)
(T) 09-25-80	4-Appellees' motion for permission to file brief without index (p-25)
(T) 09-25-80	Clerk's order granting appellees' motion for permission to file brief without index
(T) 09-25-80	15-Appellees' brief (p-25)
(T) 09-25-80	4-Motion of Atlantic Richfield Company, et al. for leave to file brief and to participate in oral argument as amicus curiae (p-25)

DATE	FILINGS—PROCEEDINGS

(B) 09-26-80 Argued before Robinson, CJ and USDC Judge Harold Greene. At the outset the Court announced that Circuit Judge Wald is a member of this panel but is unable to be present. She will participate in the decision of this case on the briefs and tape recordings

(B) 09-29-80 Per Curiam order that the District Court's order of September 17, 1980, denying appellants' alternative motion for a preliminary injunction, be and hereby is affirmed to the extent that it refused to restrain the lease sales currently scheduled for September 30, 1980, October 21, 1980 and November 18, 1980; and this cause shall remain under submission to enable this Court to further consider and to decide all remaining issues presented by this appeal, for which purpose jurisdiction is hereby reserved; Robinson and Wald, CJ's, and USDC Judge Harold Greene

(B) 09-30-80 Per Curiam order that the motion of Atlantic Richfield Company for leave to participate as amicus curiae is granted and that the motions to waive appendix and to waive reproduction of the record are granted; Robinson and Wald (who did not participate), CJ's: and USDC Judge Harold Greene

(B) 09-30-80 15-Amicus Curiae brief (p-25)

(T) 10-09-80 4-Appellants' motion for expedited ruling (p-8)

(T) 10-16-80 4-Appellees' motion for permission to file supplemental brief (p-16) & (p-17)

(C) 10-20-80 1-Appellees' corrected certificate of service

(T) 10-22-80 4-Appellants' opposition to appellees' motion for permission to file supplemental brief (m-21)

(R) 10-30-80 Opinion for the Court filed by Circuit Judge Wald

(R) 10-30-80 Judgment remanding this case to the District Court for further proceedings consistent with the opinion of this Court

DATE	FILINGS—PROCEEDINGS

(R) 10-30-80 Per Curiam order that the Court's opinion having issued this date, that the motion for expedited decision is dismissed; further ordered that appellees' motion for leave to file a supplemental brief is granted;

(B) 10-30-80 25-Appellees' supplemental brief (p-16)

(T) 11-13-80 4-Appellants' bill of costs (m-13)

(H) 12-8-80 Copy of opinion and certified copy of judgment and bill of costs in the amount of $999.50 issued to District Court.

(T) 01-16-81 Copy of letter from Clerk, Supreme Court in SC NO. A-616 dated January 15, 1981 extending the time for filing a petition for writ of certiorari to and including February 27, 1981

(T) 2-11-81 Receipt dated 2/4/81 from the Clerk, District Court for the certified original record (3 vols.) 4 vols. of transcript; 1 deposition and 3 brown expandable folders of exhibits

(C) 03-09-81 Notice from Clerk, SC advising that petition for writ of certiorari was filed on 2/27/81 in SC No. 80-1464

(T) 04-09-81 Certified copy of order from Clerk, Supreme Court granting the petition for writ of certiorari in SC No. 80-1464 on April 6, 1981

RELEVANT DOCKET ENTRIES

DISTRICT COURT

DATE	FILINGS—PROCEEDINGS
1979	
June 22	COMPLAINT; Affidavit of Edwin Rothschild; Appendices A thru D; Exhibit 1 thru 10.
June 22	SUMMONS (4) and copies (4) of the complaint issued. Deft. #1 ser 6-26-79. #2 ser 6-29-79; U.S. Atty. ser 7-3-79; Atty General Ser. 7-2-79.
June 25	OPPOSITION of U.S. to motion for preliminary injunction; Exhibits 1 thru 5.
June 25	MOTION of pltf. for preliminary injunction; P & A.
June 25	AMENDED MEMORANDUM of Points & Authorities of pltf. in support of their motion for a preliminary injunction; attachment.
June 26	LETTER to Clerk, James F. Davey, requesting the index which was omitted from defts.' memorandum in opposition to motion for preliminary injunction which was filed 6-25-79; attachment.
June 27	APPEARANCE of H. Bartow Farr, III as an additional attorney of record of pltfs. (CD/N)
June 25	MOTION of Western Oil & Gas Association for leave to file brief Amicus Curiae in opposition to plts.' motion for preliminary relief; Exhibit (brief)
June 29	TRANSCRIPT of proceedings of 6-27-79; Pages 1 thru 42; (Rep: C. Rebarick); court copy.
July 02	MOTION of pltfs. for entry of order modifying order of 6-27-79; memorandum; attachment.
June 27	MOTION of Western Oil & Gas Association for leave to file brief amicus curiae in opposition to pltfs.' motion for preliminary relief, heard and granted. (Rep. C. Rebarick) ROBINSON, J.

DATE	FILINGS—PROCEEDINGS

June 27 MOTION for preliminary injunction argued and taken under advisement. (Rep. C. Rebarick) ROBINSON, J.

June 27 AFFIDAVIT of pltf. of George L. Donkin; Exhibit 1.

June 27 EXHIBITS Nos. 6 & 7 of deft. in opposition to motion for preliminary injunction.

July 05 MEMORANDUM & order filed 6-27-79 denying motion for preliminary injunction. (N) ROBINSON, J.

July 06 MOTION of Western Oil & Gas Association for leave to file memorandum amicus curiae in opposition to pltfs.' motion for entry of order modifying order of 6-27-79; Memorandum; Declaration of Robert N. Harrison.

July 06 OPPOSITION of U.S. to pltf.'s motion for entry of order modifying order of 6-27-79.

July 11 MOTION of pltfs. based on subsequent events for modification of order of 6-29-79. Memorandum; Table of Contents; Appendix A thru D.

July 11 LETTER to James F. Davey, Clerk of Court, requesting correction of typographical error in a memorandum filed with the Court on 7-6-79 (opposition).

July 11 REPLY MEMORANDUM of pltfs.

July 13 ATTACHMENTS (additional) of pltfs. to pltfs.' motion, based on subsequent events, for modification of order of 6-29-79; Attachments 1 & 2.

July 13 OPPOSITION of U.S. to pltfs.' second motion for modification of order of 6-27-79

July 16 REPLY of pltfs. on their motion for modification of order of 6-29-79. affidavits of Monte Canfield, Jr (2)

DATE	FILINGS—PROCEEDINGS

July 17 MOTION of pltf. for modification of order of 6-29-79, argued and taken under advisement. (Rep: D. Bossard) ROBINSON, J.

July 17 AFFIDAVIT of George L. Donkin by pltf.; Exhibit 1 and 2.

July 17 AFFIDAVIT of H. Theodore Heintz, Jr. by defts.; Table I.

July 20 ORDER filed 7-17-79 denying pltfs.' motion for modification of Order of 6/29/79

July 19 NOTICE of appeal of pltfs. from judgment entered 7-5-79; $5.00 paid and credited; copies mailed to Bruce C. Rashkow.

July 19 NOTICE of appeal of pltfs. from judgment entered 7-20-79; $5.00 paid and credited; copies mailed to Bruce C. Rashkow.

July 20 RECORD on appeal delivered to USCA; Receipt acknowledged (79-1768)

July 23 TRANSCRIPT of proceedings of 7-17-79; Pages 1 thru 34); (Rep: D. Bossard); court copy.

July 24 SUPPLEMENTAL RECORD on appeal delivered to USCA; Receipt acknowledged (79-1633)

July 26 LETTER to Judge Robinson re: affidavit of H. Theodore Heintz, Jr.; attachment (affidavit of H. Theodore Heintz, Jr.)

July 27 APPLICATION of pltfs. for four week stay pending appellate resolution; attachments (2); memorandum; Appendix A.

July 30 OPPOSITION of defts. to pltfs.' application for 4-week stay pending appellate resolution.

July 30 MOTION by pltf. for stay pending appeal, heard and taken under advisement. (Rep: R. Weber) ROBINSON, J.

DATE	FILINGS—PROCEEDINGS

July 30 ORDER denying application of pltf. for four week stay pending appeal. (N) ROBINSON, J.

Aug. 01 TRANSCRIPT of Proceedings of 7-30-79; pp. 1-22; Rep: R. Weber (COURT COPY).

Aug. 07 REQUEST (first) of pltfs. to defts. for production of documents.

Sept. 28 MOTION by Federal defts. for enlargement of period for filing answer to complaint.

Oct. 03 ORDER filed 10-01-79, granting defts. until 10-17-79 to answer complaint; parties to submit to Court by said date certain proposed schedule. (N) ROBINSON, J.

Oct. 16 STIPULATION of defts. as to discovery.

Oct. 16 JOINT MOTION of defts. for amendment of court's order to submit proposed schedule for resolving pltfs. claim for final relief.

Oct. 16 MOTION of deft. for second enlargement of period for filing answer to complaint

Oct. 17 ORDER granting defts. until 10-26-79 to answer complaint. (N) ROBINSON, J.

Oct. 17 ORDER that parties to submit to Court by 11-15-79 certain proposed schedule. (N) ROBINSON, J.

Oct. 26 ANSWER of defts. to the complaint.

Oct. 26 CALENDARED. CD/N.

Nov. 15 JOINT STATEMENT as to schedule for resolving pltfs. claim for final relief.

Nov. 23 ORDER filed 11-21-79 that parties conclude discovery by 3-14-80; scheduling status call for 3-14-80 at 9:30 a.m. (N) ROBINSON, J.

1980

Feb. 12 REQUEST (first) by defts. for production of documents.

DATE	FILINGS—PROCEEDINGS

Feb. 13 INTERROGATORIES (first set) by defts. to pltfs.

Feb. 15 CERTIFIED copy of Judgment dated 12-20-79 from USCA affirming judgment of U.S. District Court; Opinion.

Mar. 12 MOTION of pltf. to set a new deadline for completion of discovery.

Mar. 13 STATUS CALL: further status call set 5-16-80 at 9:30 a.m. (Rep. Robert Weber) ROBINSON, J.

Mar. 17 ORDER filed 3-14-80 scheduling status call for 5-16-80 at 9:30 a.m. defts. to submit to Court certain proposed stipulation of facts by 5-6-80. (N) ROBINSON, J.

Mar. 21 TRANSCRIPT OF PROCEEDINGS taken 3-14-80; pages 1-22, (Rep. Robert M. Weber) COURT COPY

Apr. 04 ORIGINAL RECORD returned from USCA #79-1768 & 79-1787; 2 vols.; 1 exhibit; 1 supplemental record in 79-1768 only.

May 16 MOTION of pltfs. for partial summary judgment or, in the alternative, for a preliminary injunction; Statement of undisputed facts; P&A's. attachment.

May 16 FURTHER STATUS CALL: (Rep. Robert Weber) ROBINSON, J.

May 23 ORDER filed 5-22-80 that defts. submit their proposed counter stipulation within 30 days; defts. to file their motion for summary judgment & opposition to pltfs. motion for partial summary judgment within 30 days. (N) ROBINSON, J.

May 30 ANSWERS by pltfs. to defts. first set of interrogatories, materials from George Donkin.

June 23 MOTION of defts. for summary judgment, statement of material facts.

DATE	FILINGS—PROCEEDINGS

June 23 MOTION of defts. for leave to file a memorandum in excess of 35 pages. (exhibit) (memorandum), statement.

June 25 MOTION of pltfs. for extension of time to respond to defts. motion for summary judgment and to defts. opposition to pltf's motion for partial summary judgment.

June 24 INDEX and page 47 by defts. to statement of P&A in support of defts. cross-motion for summary judgment & in opposition to pltfs. motion for partial summary judgment filed 6-23-80.

June 27 MEMORANDUM by defts. in opposition to motion for extension of time.

July 02 ORDER extending pltfs. time to reply to cross-motion for summary judgment to 7-14-80. (N) ROBINSON, J.

July 07 NOTICE by pltffs. to take depositions of David Page, Alan Powers, Heather Ross, Robert Kalter, Robert Lawton, Stuart Edwards, Barbara Heller, Walter Mead, Marshall Rose and H. William Menard.

July 10 MOTION by defts. to terminate discovery; Memorandum.

July 14 MOTION by pltfs. for leave to file a reply memorandum in excess of 35 pages; Affidavit of H. Bartow Farr, III; Exhibits. (Reply memo with attachment)

July 15 DEPOSITION of H. Theodore Heintz, Jr. taken on June 17, 1980 at 9:30 a.m. for pltfs.; Attachments.

July 15 APPLICATION by pltfs. for immediate oral argument pending motion.

July 10 As of July 18, 1980, CASE reassigned from Judge Robinson to Judge Johnson.

July 17 SECOND SET of interrogatories by the defts.

DATE	FILINGS—PROCEEDINGS

July 17 OPPOSITION of pltfs. to motion to terminate discovery by August 15, 1980.

July 17 RESPONSE of pltfs. to stipulation of facts and proposed counterstipulation; exhibits A thru N (1 large brown folder).

July 22 TRANSCRIPT OF PROCEEDINGS of 5-16-80, pages 1-21 (Rep. Robert M. Weber) COURT COPY

July 29 REPLY MEMORANDUM by defts. in support of defts. cross-motion for summary judgment and in opposition to pltfs' motion for partial summary judgment, or in the alternative, for preliminary injunction index; affidavit of H. Theodore Heintz, Jr.; exhibit #14.

Aug. 05 STIPULATED MOTION of defts. to withdraw motion to terminate discovery and for expedited consideration of motions for summary judgment, memorandum, stipulation.

Aug. 08 NOTICE of filing by defts. of errata sheet in re: reply memorandum in support of defts' cross-motion for summary judgment & in opposition to pltfs. motion for partial summary judgment filed 7-29-80, attachment.

Aug. 19 CLARIFICATION OF MEMORANDUM submitted on 8-5-80.

Aug. 21 STATUS CALL: motions for summary judgment pending; motions of pltfs. and defts. to file pleading exceeding 35 pages, granted; hearing on merits and cross motions for summary judgment set for 9-2-80 at 9:30 a.m. (Rep. Sylvia Seymour) JOHNSON, J.

Aug. 22 ORDER that defts. may file a memorandum in support of defts. motion for summary judgment, etc. in excess of 35 pages, but not to exceed 50 pages. (N) JOHNSON, J.

Aug. 22 ORDER that pltfs. may file a reply memorandum in support of pltf. motion for partial summary judgment, etc., in excess of 35 pages but not to exceed 45 pages. (N) JOHNSON, J.

DATE	FILINGS—PROCEEDINGS

Aug. 25 NOTICE by defts. of filing of additional exhibits by defts.; Exhibit 13A (36 to 46), 15, & 16.

Aug. 29 TRANSCRIPT OF PROCEEDINGS, August 21, 1980, pp 1-26, (Clerk's Copy) (Rep: Sylvia Seymour).

Sept. 02 MOTION of pltfs. for partial summary judgment or for preliminary injunction, heard & taken under advisement. Motion of deft. for summary judgment, heard & taken under advisement. (Rep. Sylvia Seymour) JOHNSON, J.

Sept. 08 TRANSCRIPT OF PROCEEDINGS of 9-2-80; pages 1-98 (Rep. Sylvia Seymour) COURT COPY

Sept. 18 MEMORANDUM OPINION filed 9-17-80 denying motion of pltfs. for partial summary judgment or, in the alternative, for preliminary injunction. (N) JOHNSON, J.

Sept. 18 ORDER filed 9-17-80 denying motion of defts. for summary judgment. (N) JOHNSON, J.

Sept. 18 NOTICE OF APPEAL by pltfs. from Order filed 9-17-80; $65.00 docketing fee and $5.00 filing fee paid & credited to U.S.; copy sent to Charles W. Findlay, III.

Sept. 18 COPIES of Notice of Appeal & docket entries transmitted to USCA. USCA #80-2127.

Sept. 18 STATEMENT OF P & A by deft. in support of defts' cross-motion for summary judgment and in opposition to pltfs' motion for partial summary judgment, or in the alternative, for preliminary injunction, index, exhibits #1 through #13 (exhibits in brown folder).

Sept. 18 REPLY MEMORANDUM of pltfs. motion for partial summary judgment and pltfs' opposition to defts' motion for summary judgment, table of contents, table of citations, appendix A & B, statement of genuine issues in opposition to defts' motion for summary judgment, exhibits 1 through 15.

DATE	FILINGS—PROCEEDINGS

Sept. 22 RECORD ON APPEAL delivered to USCA. Receipt acknowledged.

Sept. 22 ORDER filed 9-19-80 amending order denying pltfs. motion for summary judgment or in the alternative for a preliminary injunction; directing the Clerk of the U.S.D.C. to file and transmit, forthwith to USCA for the District of Columbia this order as a supplement to the record. (N) JOHNSON, J.

Sept. 22 SUPPLEMENTAL RECORD transmitted to USCA. (USCA #80-2127) Receipt acknowledged.

Sept. 29 COPY of USCA Order dated 9-29-80, that District Court's order of 9-17-80 ORDERED & ADJUDGED by this Court that the District Court's order of 9-17-80, denying appellants' alternative motion for a preliminary injunction, be & hereby is affirmed to the extent that it refused to restrain the lease sales currently scheduled for 9-30-80, 9-21-80 and 11-18-80; and this cause shall remain under submission to enable this Court to further consider & to decide all remaining issues presented by this appeal, for which purpose jurisdiction is hereby reserved. (USCA#80-2127)

Dec. 03 CONSENT MOTION for entry of order directing the promulgation of regulations under Section 8 (a) (1) (E) and (G) of the Outer Continental Shelf (OCS) Lands Act, 43 U.S.C. 1337(a) (1) (E) and (G), affidavit of Heather L. Ross, attachment; affidavit of Robert H. Lawton.

Dec. 03 STATUS CALL: parties have stipulated re: possible settlement of case. Defts. are to decide by 1-28-81 whether to seek Supreme Court review of case. (Rep. Sylvia Seymour) JOHNSON, J.

Dec. 08 CERTIFIED COPY of Judgment dated 10-30-80 from USCA Ordered & Adjudged by this Court, that the order of the District Court on review herein, which refused to enjoin the lease sales scheduled for the fall of

DATE	FILINGS—PROCEEDINGS

1980, is affirmed, in accordance with this Court's order filed 9-29-80; respondents are directed to proceed expeditiously to issue the regulations required by the Outer Continental Shelf Lands Act, and this case is Remanded to the District Court for further proceedings consistent with the opinion of this Court (USCA#80-2127) OPINION

Dec. 08 BILL OF COSTS as taxed by Clerk of Court of Appeals in the amount of $999.50 to be taxed against appellee. (USCA#80-2127)

Dec. 19 STIPULATION that on 1-28-81, unless defts. have meanwhile determined to seek Supreme Court review of the opinion & judgment of the Court of Appeals issued on 10-30-80 the "Judgment on First Cause of Action" will be submitted for entry by the Court. APPROVED. (FIAT) (N) Johnson, J.

Dec. 29 ORDER filed Dec. 19, 1980 directing that the Deft. Secretary of Energy shall issue proposed regulations and report to this Court the status of compliance. (See order for details) (N) Johnson, J.

Dec. 30 DEPOSITION of H. Theodore Heintz, Jr. taken June 16, 1980 for the pltffs.; Exh. 1, 2, 3, & 4.

1981

Jan. 05 TRANSCRIPT OF PROCEEDINGS, December 3, 1980, pages 1-9; (Rep: Sylvia Seymour) COURT COPY.

Jan. 30 NOTICE of Agreement Modifying stipulation of 12-2-80 date substituted is 2-3-81. Approved. (fiat) (see for details) JOHNSON, J.

Feb. 03 NOTICE by defts. to the Court that stipulation of 12-2-80 has no force & effect since defts. have decided to seek Supreme Court review of the decision of USCA issued on 10-30-80.

Feb. 09 ORIGINAL RECORD returned from USCA (3) vol., (4) transcripts, 1 deposition & 3 brown expandable folders of exhibits. (USCA#80-2127)

DATE	FILINGS—PROCEEDINGS

Feb. 26 MOTION by pltfs. for immediate entry of judgment pursuant to the opinion & judgment of the Court of Appeals, attachment.

Feb. 27 NOTICE by pltfs. to take deposition of Charles W. Findlay, III.

Mar. 02 MOTION by defts. for stay of deposition, attachment.

Mar. 02 STATUS REPORT (first) of defts., attachment.

Mar. 03 OPPOSITION by pltfs. to motion for stay of deposition.

Mar. 04 NOTICE by defts. of filing attachment A of defts. reply to pltfs. opposition to motion for stay of deposition, attachment A.

Mar. 04 MOTION of deft. for stay of deposition (Heather Ross), granted. Deposition stayed pending ruling on motion for protective order. Deft. is to file motion for protective order by 3-17-81. Motion of pltf. for entry of judgment is set for 3-13-81 at 2:00 p.m. deft is to file opposition, if any, by 3-11-81. (Rep. Sylvia Seymour) JOHNSON, J.

Mar. 05 MEMORANDUM filed 3-4-81 on Governments Duty to experiment with Non-Cash Bonus and Variable Net Profit Share Leasing. JOHNSON, J.

Mar. 11 OPPOSITION by defts. to pltfs. motion for entry of partial judgment, attachment A.

Mar. 12 REPLY MEMORANDUM by pltfs. in support of judgment.

Mar. 13 MOTION of pltf. for entry of judgment, granted. Deft. is to file motion for protective order by 3-17-81, Pltf. will respond by 3-26-81, motion for protective order set for 4-6-81 at 9:30 a.m. (Rep. Sylvia Seymour) JOHNSON, J.

DATE	FILINGS—PROCEEDINGS

Mar. 18 JUDGMENT filed 3-13-81 on First Cause of Action; awarding pltfs. their costs under the first cause of action; the Court reserves action on the remaining causes of action pending completion of discovery, etc. (N) JOHNSON, J.

Mar. 23 MOTION by defts. for protective order, memorandum.

Mar. 26 WITHDRAWAL by pltfs. of deposition notice for Assistant Secretary Heather Ross filed 7-7-80.

Mar. 26 SUGGESTION OF MOOTNESS by pltfs.

Apr. 01 MOTION by defts. for dismissal of third cause of action.

Apr. 01 REPLY by defts. to pltfs. suggestion of mootness & memorandum.

Apr. 01 STATUS REPORT (second) of defts., attachment.

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INDIVIDUAL CONSUMER, TAXPAYER, AND CITIZEN PLAINTIFFS

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GOVERMENTAL LESSOR AND CONSUMER PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary of the Interior,
JAMES R. SCHLESINGER, Secretary of Energy, and
THE UNITED STATES OF AMERICA, DEFENDANTS

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First Cause of Action: In Violation of the Outer Continental Shelf Lands Act Amendments, Defendants Have Failed to Issue Regulations to Implement the Bidding Systems Authorized by the 1978 Amendments, and Propose to Continue to Use Inferior Bidding Systems that Do Not Assure Receipt of Fair Value, Adequate Competition, or Efficient Development 89

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

This action is brought by the Energy Action Educational Foundation, State Lands Commission of California, the City of Long Beach, California, various representative organizations and consumers of natural gas and oil products, federal taxpayers, and citizens of the United States against the United States, the Secretary of the Interior and the Secretary of Energy to prevent further violation of the Outer Continental Shelf Lands Act, as amended, and to redress past violations of the Act. The Complaint charges that defendants, contrary to the Act, have leased the oil and gas resources of the Outer Continental Shelf under a cash-bonus bidding system with pre-set low royalties that has not provided adequate information, promoted adequate competition or distribution of resources among private enterprises, stimulated development of oil and gas, or returned fair value for the sale of public resources. The Complaint further charges that defendants intend to continue to use the cash-bonus, low-royalty system for future leases, despite the fact that it is inherently incapable of meeting the objectives of the Act and despite recognition by defendants and other federal officials that other leasing systems are more advantageous to the public, and that defendants have failed to take the steps necessary to make fully available other systems that better meet the statutory criteria for federal offshore leasing.

Plaintiffs include consumers of natural gas and oil products who complain of the violation of the statutory assurances that Outer Continental Shelf properties shall be leased to promote competition and to achieve prompt development of energy resources, as well as taxpayers and competing lessors of offshore oil and gas properties who complain that the leasing system employed by defendants grants public rights to private developers for less than their fair value.

Plaintiffs seek three separate forms of relief: (1) Declaratory and injunctive relief prohibiting the defendants from holding any further lease sales until the required regulations for implementing other, superior bidding systems have been promulgated; (2) Declaratory and injunctive relief prohibiting any further leasing by cash-bonus, low-royalty bidding systems that do not meet the requirements of the Outer Continental Shelf Lands Act, as amended; and (3) An Order directing defendants to review all past leases to determine whether their issuance and continuance was consistent with the requirements of the Outer Continental Shelf Lands Act and, if not, to take any appropriate corrective action.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to 43 U.S.C. § 1349 (the Outer Continental Shelf Lands Act), 28 U.S.C. § 1331, 28 U.S.C. § 1361, and 28 U.S.C. § 2201.

2. Defendants reside, and the causes of action arose, in this District.

THE PARTIES

3. *Organizational Consumer Plaintiffs:*

The following organizational plaintiffs are consumers of natural gas and/or oil products and represent consumers of natural gas and/or oil products.

a. Plaintiff Energy Action Educational Foundation is a nonprofit research and educational organization supported by private citizens, who are taxpayers and consumers of natural gas and oil products. Energy Action specializes in the analysis of energy issues affecting its supporters and other similarly situated citizens. It has frequently testified before Congress and provided its views to defendants and various citizen groups regarding the matters raised in this action. See Appendix B.

b. Plaintiff Consumer Federation of America, a New York corporation, is composed of over 220 national, state,

and local consumer organizations located throughout the nation, representing over 30 million American consumers. Since its inception, Consumer Federation has worked to promote national energy policies and programs benefiting consumers of natural gas and oil products.

c. Plaintiff Consumer Energy Council of America is a broad-based coalition of consumer, labor, farm, public power, rural electric cooperative, urban, and senior citizen organizations formed to advocate the consumers' interest in national energy policy. Its member organizations are listed in Appendix A.

d. Plaintiff Michigan Citizens Lobby is the largest consumers organization in Michigan, with a membership of approximately 65,000 families, and has represented its membership before government bodies on numerous energy-related issues.

e. Plaintiff Arkansas Consumer Research, Inc., is a nonprofit organization, supported principally by contributions from consumers of oil and gas, with a membership of over one thousand persons throughout the State of Arkansas.

f. Plaintiff Service Employees International Union is a 600,000-member union of health care, building maintenance, and public service workers throughout the United States and Canada.

g. Plaintiff International Association of Machinists is a union with nearly one million members, which has worked for legislation to assure adequate federal monitoring and control of energy resources.

h. Citizen/Labor Energy Coalition is a coalition of over 100 member organizations made up of labor unions, church groups, and elderly, minority, consumer, and environmental groups interested in establishing a national energy policy reflecting the needs of American citizens. Its member organizations are listed in Appendix A.

i. Plaintiff Texas Consumer Association, is a voluntary consumer group comprised of over 800 individual taxpayers and consumers.

Individual Consumer, Taxpayer, and Citizen Plaintiffs

j. Plaintiff M. James Doling is a consumer of natural gas and/or oil products. He is a citizen and taxpayer of the United States.

k. Plaintiff Paul Casagrande is a consumer of natural gas and/or oil products. He is a citizen and taxpayer of the United States.

l. Plaintiff Kathleen F. O'Reilly is a consumer of natural gas and/or oil products. She is a citizen and taxpayer of the United States.

Governmental Lessor and Consumer Plaintiffs:

m. Plaintiff California State Lands Commission (sometimes hereinafter referred to as the "Commission") is an agency of the State of California, established pursuant to the statutes of that State with the authority and responsibility for administration and supervision of certain public lands of that State. In particular, the Commission is authorized to administer the ungranted sovereign tidelands, those areas of land and water lying seaward of the line of high tide to the outer boundary of the State, which tidelands are held in trust for the people of the State. Pursuant to the statutes of California, the Commission is responsible for proper exploitation of the mineral resources in, under or upon such public lands, and for the administration or supervision of all contracts or leases for oil or gas production from the tidelands, including the sale of such oil and gas owned by the State or held in trust for the State. The Commission is also responsible for the administration of the State's interest in certain granted tidelands, particularly including responsibilities set forth in Chapter 138, Capitol Statutes of 1964 (First Extraordinary Session) as to granted tidelands in the City of Long Beach, which responsibilities include collecting and accounting for State revenues derived from the production of oil and gas from said granted tidelands within the City of Long Beach.

n. Plaintiff City of Long Beach (sometimes hereinafter referred to as "Long Beach") is a municipal corporation established under the Constitution and statutes of the State of California. Pursuant to statute, particularly including Chapter 138 of the Laws of the 1964 First Extraordinary Session of the Legislature of the State of California, Long Beach has been granted trust authority and responsibility for the operation of oil and gas production from tidelands in the Long Beach Harbor area, as specifically described in said Chapter 138. This authority and responsibility is to be exercised jointly with or subject to the approval of the California State Lands Commission.

4. The injuries of the respective plaintiffs are set forth at paragraphs 129-132, *infra.*

5. *Defendants:*

a. Defendant United States hold title to all lands and resources of the Outer Continental Shelf for the benefit of citizens of the United States.

b. Defendant Cecil D. Andrus is Secretary of the Department of the Interior (sometimes hereinafter referred to as the "Secretary") and is sued in his official capacity. Congress has conferred on the Secretary of the Interior principal responsibility for administering the leasing of federal offshore lands pursuant to the Outer Continental Shelf Lands Act.

c. Defendant James R. Schlesinger is Secretary of the Department of Energy and is sued in his official capacity. Congress has transferred from the Secretary of the Interior to the Secretary of Energy responsibility for promulgating regulations governing the use of bidding systems authorized by Section 8(a)(1) of the Outer Continental Shelf Lands Act, as amended, as well as other obligations under the Act.

FACTUAL ALLEGATIONS

6. The present system of leasing oil and gas resources on the Outer Continental Shelf is conducted pursuant to the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §§ 1331, *et. seq.* Although Congress has made manifest its intention that offshore leasing should be managed, with adequate geological information, to promote competition, to encourage prompt development, and to assure the receipt of fair value, defendants have adhered, and continue to adhere, to historical practices that do not, and cannot, meet these objectives.

Section I: Early Exploration and Development of Federal Mineral Lands.

7. The early exploration and development of public lands, with some exceptions, was conducted without a formal statutory framework. Prospectors staked mining claims and began operations without license or title, although without prohibition, from the Federal Government. These operations then gave rise to implied rights in the lands and the minerals produced.

8. Following the California gold rush and other mining expeditions in the West, pressure increased on Congress to adopt legislation regulating exploration for and development of public resources. In response, Congress passed the Act of July 26, 1866, which declared "the mineral lands of the public domain . . . to be free and open to exploration and occupation," subject to governmental regulations and "to the local customs or rules of miners in the several mining districts." 14 Stat. 251 (1866). The 1866 Act did not provide for the leasing of public lands; it conveyed legal title to claimants meeting the established requirements.

9. Six years later, Congress passed the Act of May 10, 1872, which superseded the 1866 Act in its entirety. The General Mining Law of 1872, like its predecessor, pro-

vided for the sale, not the lease, of public lands. Section 1 of the Act stated:

> "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." 30 U.S.C. § 22.

Section 6 of the Act provided that: "[a] patent for any land claimed and located for valuable deposits may be obtained" by filing an application and "a certificate of the United States Chief Cadastral Engineer that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors." 30 U.S.C. § 29. Publication of the application was required, and if no adverse claim was filed it was assumed that the applicant was entitled to a patent, "upon the payment to the proper officer of $5 per acre." *Ibid.*

10. The General Mining Law of 1872, with its generous provisions to encourage development of mineral resources, governed most mineral exploration and development for the next fifty years. During that period, however, there was increasing concern about conservation of valuable resources. For example, the Director of the United States Geological Survey submitted a report in 1909 to the Secretary of the Interior noting that oil lands in California were being patented by private parties at such a rate that it would "be impossible for the people of the United States to continue ownership of oil lands for more than a few months. After that the Government will be obliged to repurchase the very oil that it is practically giving away. . . ." *See United States* v. *Midwest*

Oil Co., 236 U.S. 459 (1915). The result of this concern was that large areas of land were withdrawn by presidential proclamation and were no longer subject to patenting under the General Mining Act of 1872.

11. The withdrawals led to a controversy that Congress resolved in 1920 by passing the Mineral Lands Leasing Act, now codified at 30 U.S.C. § 181 *et. seq.* The final Conference Report accompanying the bill stated:

> "The legislation provided for herein, it is thought, will go a long way toward the development of the West and of the national resources of the West and at the same time reserve to the Government the right to supervise, control, and regulate the same, and prevent monopoly and waste and other lax methods that have grown up in the administration of our public-land laws. In addition thereto, royalties and rentals are provided, so that the government may not be passing title to the natural resources without receiving something in return therefor." H.R. Report No. 1138, 65th Cong. 3d Sess., p. 19 (1919).

One federal court has said that the Mineral Lands Leasing Act was "the expression of a new policy for the disposition of public lands open to exploration or entry, by lease, instead of by complete alienation." *West* v. *Work*, 56 App. D.C. 191, 11 F.2d 828, 831, *cert. denied*, 271 U.S. 689.

12. Section 1 of the Mineral Lands Leasing Act stated that:

> "[D]eposits of . . . oil . . . or gas, and lands containing such deposits owned by the United States . . . shall be subject to disposition in the form and manner provided by this chapter . . . ." 30 U.S.C. § 181.

Section 17 of the Act then provided that the principal method of disposition was to be by lease. 30 U.S.C. § 226(a). The procedure for leasing under the statute

depended upon the nature of the lands to be leased. If they were

> "not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold the lease under this chapter shall be entitled to a lease of such lands without competitive bidding. Such leases shall be conditioned upon payment by the lessee of a royalty of 12½ per centum in amount or value of the production removed or sold from the lease." 30 U.S.C. § 226(c).

If, on the other hand, the lands were

> "within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations in units of not more than six hundred and forty acres which shall be as nearly compact in form as possible, upon the payment by the lessee of such bonus as may be accepted by the Secretary and of such royalty as may be fixed in the lease, which shall be not less than 12½ per centum in amount or value of the production removed or sold from the lease." 30 U.S.C. § 226(b).

The Act, therefore, gave the Secretary of the Interior the power not only to collect cash bonuses in competitive bidding but also to establish a royalty rate for competitive leases higher than the specified 12½%.

13. The Act also provided for a rental on all leased lands "of not less than 50 cents per acre for each year of the lease." 30 U.S.C. § 226(d). Once oil or gas in paying quantities had been discovered on the lands, a minimum royalty of $1.00 per acre was payable in lieu of rental. Competitive leases were for a primary term of five years, while noncompetitive leases were for a primary term of ten years. Each lease was to continue "so long after its primary term as oil or gas is produced

in paying quantities." 30 U.S.C. § 226(e). The Secretary was authorized to terminate leases for nonperformance after notice and an opportunity to correct any default. 30 U.S.C. § 226(f).

14. Most leases issued under the 1920 Act have been issued noncompetitively; an estimate made by the Department of the Interior in 1972 indicated that over ninety percent of the leases were noncompetitive. For those leases, the royalty is set at 12½% of the value of production. For competitive leases, the Secretary has established a sliding royalty rate that increases from 12½% to less than twenty-five percent if production exceeds 400 barrels per well per day. For gas the royalty is 12½% if production is less than 5,000 Mcf per well per day and 16⅔% if production exceeds 5,000 Mcf. Cash bonus payments for leases under the 1920 Act have not been substantial, totalling less than $40 million for the period of 1950 through 1973.

Section II: Leasing of Federal Offshore Lands: the 1953 Outer Continental Shelf Lands Act.

15. Although onshore mining activities have had a long history, federal leasing of offshore lands containing oil and gas did not begin until 1954. Earlier, it was generally assumed that states had title to the lands off their shores. Oil drilling had begun off the California coast in 1879 and California, Louisiana, and Texas had all claimed statutory authority to lease offshore lands. In 1934, the Interior Department refused to issue a drilling permit off the California coast on the ground that California owned the land. *Joseph Cunningham*, 55 I.D. 1, 2 (1934). At that time, the Secretary of the Interior stated that "[t]itle to the soil under the ocean within the three-mile limit is in the State of California, and the land may not be appropriated except by authority of the State." *Ibid.*

16. In 1938 and 1939, resolutions were introduced in Congress to appropriate for the United States the lands

lying within three miles of state boundaries. These resolutions were unsuccessful. In 1945, contrary resolutions were introduced in the Congress, seeking to quiet title in these lands to the State. These resolutions passed in 1945, but were vetoed by President Truman.

While these resolutions were pending, the Attorney General of the United States brought an action against the State of California, alleging that the United States "is the owner in fee simple of, or possessed of paramount rights in and power over" the submerged land within three miles of the California coast. In 1947, the Supreme Court held that the United States had full title to all offshore lands and that the State of California "has no title to or property interest therein." *United States* v. *California*, 332 U.S. 19. Subsequent decisions affirmed the title of the United States to Outer Continental Shelf lands in the Gulf of Mexico. *United States* v. *Texas*, 339 U.S. 707; *United States* v. *Louisiana*, 339 U.S. 699.

17. During the late 1940's and early 1950's, Congress held extensive hearings and debates regarding allocation of responsibility between state and Federal governments for the administration of offshore resources. The principal question before Congress was whether to override the decision in *United States* v. *California* and the subsequent decisions, and to return to the states juirsdiction over the lands within three miles of their boundaries.

18. Supporters of state control pointed out that the states had substantial experience in conducting leasing operations offshore, while the Federal Government had none. Proponents of state control also argued that the states had been able to exact far higher payments under their leases with the oil companies than the Federal Government had been able to do on its onshore leases. For example, the Commissioner of the General Land Office in Austin, Texas, testified that the State received royalties as high as 52½% on some onshore lands and 51½% in the marginal sea. "Title to Submerged Lands Beneath Tidal and Navigable Waters": Hearings on S.

1988 and Similar House Bills Before the Senate Committee on the Judiciary and the House Committee on the Judiciary, 80th Cong., 2d Sess. 415 (1948). The Attorney General of California submitted figures showing that the average oil royalty on state leases in California was approximately 23.79%, while that of the Federal Government was approximately 11.83%. *Id.*, at 918. The City Attorney of Long Beach testified that under a 1947 agreement the City received 94.1% of the proceeds of the sale of offshore oil and gas produced, from which it was required to pay drilling and maintenance and operations costs, but was in any event guaranteed a net minimum of 60.01% of the gross revenues. *Id.* at 784-785. Other witnesses testified about royalty returns under leases of nearly 30%, *id.* at 845, 50½%, *id.* at 1137, and 52½%, *id.* at 1245, in California and Texas.

19. Federal officials also criticized the rate of return under federal leases. For example, The Attorney General of the United States, Tom C. Clark, referring to the California Long Beach lease, observed:

> "So we say that if Long Beach can get eighty-five percent, maybe the Federal Government can get more than ⅛th." *Id.* at 685.

Former Secretary of the Interior, Harold Ickes, testified that the current federal system of onshore leasing did not provide for sufficient royalties, and urged that "the Congress ought to pass a fair bill, providing for fair royalties, and then let the Secretary of the Interior administer it; hold him responsible if he does not." *Id.* at 1183.

20. Congress was equally concerned that the Federal Government improve its leasing programs to encourage competition in the sale of leases and in the production of oil. A House Report, H.R. Rep. No. 695, 82d Cong., 1st Sess. (1951), emphasized that

> "[f]inding oil calls for a variety of efforts by a number of operators, and by a policy of free and

> open exploration a number of operators may explore the same areas and may compete in the bidding, thereby increasing the return to the government and also greatly enhancing the chances of discovering oil or gas in the area." *Id.* at 7.

Accordingly, the Report stated that "competitive bidding" is

> "the only sound basis upon which leases should be granted. Such procedure gives all interested operators a chance to secure leases upon the leasing units which are the subject of bidding." *Id.* at 8.

The Report also stressed the need to "prevent concentration of holdings in any one operator and . . . thus ensure wide ownership of leases among the limited number of qualified operators." *Id.* at 9.

21. In 1953, Congress passed the Submerged Lands Act, 43 U.S.C. § 1301 *et. seq.*, relinquishing federal title to all land up to three miles from the coastline of any state. Although earlier versions of the Bill also included provisions to govern federal leasing beyond the three-mile limit, those provisions were deleted before final passage.

22. Later in 1953, Congress passed the Outer Continental Shelf Lands Act ("The OCS Act"), to provide for the leasing of lands beyond the three-mile limit. 43 U.S.C. § 1331 *et. seq.* This Act, which remained essentially unchanged until 1978, gave to the Secretary of the Interior extensive responsibility for administering leases of federal offshore lands.

23. The OCS Act sought to assure that the Government received a fair return for the minerals produced under offshore leases. Unlike the Mineral Lands Leasing Act of 1920, therefore, the Act included no provision for the awarding of leases without the safeguard of competition. To secure a fair return, Section 1337 provided that the Secretary "was authorized to grant to the highest responsible qualified bidder by competitive bidding

under regulations promulgated in advance, oil and gas leases on submerged lands of the Outer Continental Shelf . . . ."

24. The OCS Act, also unlike the Mineral Lands Leasing Act of 1920, provided different methods under which the Secretary could offer leases for competitive bidding. Section 1337 provided that

> "[t]he bidding shall be (1) by sealed bid, and (2) at the discretion of the Secretary, on the basis of a cash bonus with a royalty fixed by the Secretary at not less than 12½ per centum in amount or value of the production saved, removed or sold, or on the basis of royalty, but at not less than the per centum above mentioned, with a cash bonus fixed by the Secretary."

The legislative history shows that the Congressional decision to allow leasing systems other than the traditional cash-bonus bidding used in onshore operations was a deliberate one adopted in the face of substantial industry opposition. For example, Hines H. Baker, President of Humble Oil and Refining Company, argued that

> "[l]eases should be awarded to responsible and qualified bidders upon the basis of the highest bonus payment offered. Rentals and royalties should not be subject to bidding but should be uniform and fixed in all leases . . . . Selection of the successful bidder on the basis of the highest bonus payment offered, with rentals and royalties being fixed for all leases, is recommended because that method will assure the higher monetary return to the government as lessor and will secure more responsible operators." "Conservation and Control of Submerged Coastal Lands. . . .": Hearings on H.R. 5991 and H.R. 5992 Before the House Judiciary Committee, 81st Cong., 1st Sess. 151 (1949).

Congress nevertheless elected to give to the Secretary of the Interior the flexibility to adopt other systems.

25. Section 1334 increased the flexibility of the bidding systems allowed in Section 1337 by specifically granting the Secretary the power to promulgate regulations for the "reduction of rentals or royalties." Thus, the Secretary was not bound to an original royalty figure specified in a lease if reduction was necessary to serve other important purposes of the Act, such as the maximum efficient development of the resources. The Secretary was also given authority to "prescribe such rules and regulations as may be necessary to carry out" the leasing provisions of the 1953 Act.

26. Section 1340 gave the Secretary the important power to authorize exploration of the Federal offshore lands. It provided that

> "[a]ny agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the Outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this subchapter and which are not unduly harmful to aquatic life in such area."

It was possible, therefore, for the Government either to do its own exploratory work prior to selling resources or to contract with private firms to conduct such exploration.

27. Section 1337(b) established that leases were to be "for a period of five years and as long thereafter as oil or gas may be produced from the area in paying quantities, or drilling or well-reworking operations as approved by the Secretary are conducted thereon . . . ." The Act specifically provided, however, that the Secretary "may cancel any lease obtained by fraud or misrepresentation." 43 U.S.C. § 1337(i). In addition, the Act allowed for cancellation in the event of noncompliance with the provisions of the statute, regulations, or the lease itself. 43 U.S.C. § 1334(b)(1)(2). The Secretary was given the power to cancel a nonproducing lease without resort to

the Federal Courts, and he was authorized to cancel a producing lease by initiating an appropriate forfeiture proceeding in District Court.

28. The Act also stressed the need for prompt exploitation of the offshore resources. Section 1337(a) specifically stated that the Secretary was granted his broad powers "[i]n order to meet the urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the Outer Continental Shelf."

29. The Outer Continental Shelf Lands Act of 1953 thus committed Congress to a leasing program that generated increasing knowledge about the value and potential of the resources on the Outer Continental Shelf, enhanced competition, expedited development of oil and natural gas resources, and obtained a fair return to the public by the use of flexible bidding systems. In so doing, the OCS Act met the objectives expressed by Secretary McKay of the Department of the Interior, who had urged that proposed legislation

> "should . . . empower the Department of the Interior or such other department or agency as the President may designate, to take appropriate action to prevent waste, to provide for exploration and development, to supervise production, and to recover fair and just revenues for the benefit of the Nation as a whole." "Submerged Lands": Hearings on S.J.Res. 13 *et. al.* Before the Senate Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. 512-513 (1953).

Section III: The Results of a Cash-Bonus, Low-Royalty Bidding System from 1954-1978: Inadequate Competition, Slow Development, and Denial of Fair Return.

30. Federal offshore leasing from 1954 to 1978 divides into roughly two phases. From 1954 through 1972 the federal offshore leasing program was conducted at a

reasonable pace in an era of relatively normal market conditions and stable oil and gas prices. During that time, the Secretary leased an average of 425,000 acres per year. In the same period, the price of oil never exceeded $3.40 per barrel, and the average price of natural gas never exceeded $.19 per Mcf.

The leasing activity changed significantly in 1973. Early in 1973, President Nixon directed the Secretary of the Interior to increase the acreage to be leased on the outer Continental Shelf to 3,000,000 acres per year, and in January 1974, he directed that acreage be increased to 10,000,000 acres a year beginning in 1975. Although the leasing program fell far short of that goal, the average yearly acreage leased after 1972 has substantially exceeded 1,000,000 acres.

At the same time, price rises for oil and gas have commenced and continued. In late 1973, members of the Organization of Petroleum Exporting Countries (OPEC) proposed an embargo on exports of oil. This action, along with other factors, caused a sharp increase in the price of crude oil. Compared to a base price of $3.40 in 1972, the highest price for domestic crude oil reached $9.51 a barrel in December 1973, $11.08 a barrel by December 1974, $13.98 a barrel by December 1977, and is now $16.00 a barrel.

The average price of natural gas also advanced rapidly. By 1974 the price of natural gas had risen to $.30 per Mcf (compared to $.19 in 1972). By 1978 the price had increased to $.92 per Mcf. Today, the price for gas found on new Outer Continental Shelf leases is $2.40 per Mcf.

31. Although the OCS Act clearly provided for other methods of bidding, in the face of industry opposition to such other methods, every one of the lease sales held by the Secretary from 1954-1972 was conducted pursuant to a cash-bonus, low-royalty system. This system specified that the lessee of a particular tract should pay a royalty of 16⅔% of the value of any production from

the lease—or approximately four percent above the statutory minimum. The lease was then awarded to the bidder who offered the highest cash bonus in advance by sealed bid.

32. Despite the effects of the developments discussed in paragraph 30, *supra*, the Secretary also has conducted every lease sale from 1973 through 1978, with only two exceptions (see paragraphs 73 and 74, *infra*), on the basis of cash-bonus bidding with pre-set royalty rates. In the vast majority of sales, the royalty was set at the usual low 16⅔%. In a few cases, the Secretary employed a sliding-scale royalty that increased as the value of production increased.

33. Although the 1953 OCS Act gave the Secretary substantial powers to achieve the objectives of the Act, discussed in paragraph 29, *supra*, the Secretary has not exercised those powers in the public interest. During the first twenty-five years of federal offshore leasing, the Secretary has pursued a program that has (a) failed to provide the Government with adequate information for effective leasing by auction, (b) failed to promote competition in the lease sale market, (c) failed to stimulate competition in the production of crude oil and gas, (d) failed to encourage development, and (e) failed to assure or obtain fair market value. As a result, the major oil and gas companies have received substantial benefits from the federal leasing program at the expense of consumers, taxpayers, and the public treasury.

A. *The Government Has Had Inadequate Geological Information to Assure Receipt of Fair Value Through Cash-Bonus Bidding.*

34. The Secretary has continually conducted his leasing program without obtaining adequate information about the resources to be leased. As a result, tracts are frequently leased without sufficient information to evaluate the relationship of the high bid to the fair value of the resources to be discovered. See paragraphs 39 and

40, *infra*. Moreover, this lack of information increases the risks to the companies, inhibits competition from smaller, independent producers, and thus decreases the number and size of bids. See paragraph 37, *infra*.

35. Although the 1953 Outer Continental Shelf Lands Act expressly conferred power on the Secretary to conduct exploratory drilling, the Secretary has not exercised that power to develop meaningful pre-lease information about Outer Continental Shelf resources. Nor has the Secretary required, as a condition of issuing pre-lease exploration permits, that the permittees make all information in their own possession available to the Federal Government and others willing to share the cost. In the twenty-five years of federal offshore leasing, the Secretary has never contracted for the drilling of an onstructure well to obtain a reliable estimate of the value of resources to be sold, nor has he allowed others to do so.

36. The Government has relied heavily on industry nominations in determining the tracts to be offered for lease. This process is grossly unreliable because the companies may overnominate to disguise interest in particular tracts, and companies typically have not been required to share all available information with the Government, even if obtained pursuant to exploration permits granted by the Government. The Government ordinarily does not have sufficient information of its own to distinguish the desirable tracts from the undesirable tracts nominated by the companies and to select the appropriate tracts for leasing. Moreover, the Federal Government has failed to generate further information or to evaluate more completely the information submitted to it. See paragraph 94, *infra*.

37. The failure of the Secretary to obtain adequate resource information imposes on prospective bidders under a cash-bonus bidding system a substantial burden of risk that few can assume. Without sufficient information about the potential resources to be acquired, and without assurance that the Government is able to select

the most desirable tracts, smaller, independent producers cannot obtain financing for the substantial cash bonuses that must be paid, with consequent further lessening of competition in the bidding process.

38. When information is insufficient to determine whether the highest bids accurately reflect the value of the resource to be leased, and when capital barriers limit competition in bidding for tracts, the Government cannot assure the receipt of fair value for its leases. As a 1975 Congressional Report indicated,

> "[a]s long as competition for a tract is high, the accuracy of the presale value as an estimate of the true resource value is relatively unimportant, since competitive forces can be assumed to keep the high bids fairly close to the true value. However, as the number of tracts receiving only one or two bids increases, the presale value becomes a major factor for assuring that fair market value is received for each tract."

An Analysis of the Department of Interior's Proposed Acceleration of Development of Oil and Gas on the Outer Continental Shelf, Committee on Commerce and Members of the National Ocean Policy Study, March 5, 1975, at 4.

39. The presale evaluations by the Department of the Interior have proved wholly unreliable indicators of actual bidding values. For example, in lease sales held between May 1968 and December 1972, the presale evaluations by the Department amounted successively to only 17%, 26%, 58%, 82%, 18%, 14%, 11%, 5%, and 24% of the winning bids. In those same lease sales, tracts were awarded to a single bidder with no competitors, 22%, 24%, 65%, 38%, 32%, 0%, 18%, 6% and 13% of the time, and to one of two bidders another 14%, 31%, 15%, 37%, 36%, 5%, 37%, 18% and 9% of the time. The Secretary, therefore, was awarding substantial numbers of leases with almost nonexistent bidding competition and, at the same time, without a realistic evalu-

ation of the bidding value that the tracts should have commanded and would have commanded with adequate competition.

40. After 1972, when acreage leased was increased and oil prices started climbing, the presale evaluations by the Department of the Interior, which now had to assess even more volatile conditions, bore even less resemblance to the winning bids. In the first four lease sales of 1973 and 1974, for example, the presale evaluations averaged 22.9%, 9.7%, 29.1% and 17.5% of the winning bids. Furthermore, when competition for a particular tract was greater, the difference between the winning bid and the presale evaluation increased dramatically.

41. The lack of information obtained by the Government is reflected not only in bid figures but also in production figures. Many leases produce oil and gas in substantially greater quantities than the Government anticipated at the time of leasing. For example, thirteen of the tracts offered at the December 15, 1970 Gulf of Mexico sale were awarded for bonus bids of $257,733,824. By the end of 1976, an early point in their production history, these leases had yielded $1,433,269,160 in revenues to the lessees. The cash-bonus, low-royalty bidding system gives the Government, and thus the public, very limited participation in the unexpected benefits of high production and rapidly increasing prices. Where there is little or unreliable presale information, it is less likely that the cash bonus will capture at the outset a proper share of revenues from future substantial production or increasing prices and more likely that the lessees will obtain undue profits at the expense of the public.

B. *The Cash-Bonus, Low-Royalty System Has Prevented Adequate Competitive Bidding for Leases.*

42. Although the Outer Continental Shelf Lands Act emphasized the need for competitive bidding to assure fair value and the equitable distribution of resources,

competition for leases has been inhibited by the almost exclusive use of the cash-bonus, low-royalty bidding system.

43. The cash-bonus, low-royalty system, unlike other bidding systems, requires the expenditure of large cash amounts before any resources have been recovered and when risks are very high. At the time leases are awarded, uncertainty about discovery prospects, exploration and development costs, and future production and prices is great. Smaller companies cannot afford to spread risks over a large number of leases, as large, integrated oil companies can do. Nor can they obtain bank financing in view of the uncertainty about the resources to be recovered. See paragraph 37, *supra.* Thus, because of the cash-bonus, low-royalty system, large, integrated companies face much less significant competition from independent producers.

44. The cash-bonus, low-royalty system affects competition in offshore leases by encouraging joint bidding. The high capital requirements and the high degree of risk may promote bidding combinations among companies that otherwise might bid in competition with each other.

45. The Secretary of the Interior has further limited competition in the bidding process by offering large numbers of tracts for sale on a single day. Because of this system, companies must limit their overall cash-bonus bids to avoid winning more tracts than they can afford. Companies may decide not to bid on particular tracts that they would bid on at a later time if they knew the results of their bidding on other tracts. Companies may also submit lower bids for particular tracts, hoping and expecting that the spread of competition will result in few or no other bids. These bidding practices increase the likelihood that the Government will not receive a fair return for its resources from a cash-bonus, low-royalty system.

46. During the leasing period from 1954 to 1972, there was an average of approximately 3.5 bidders per

tract actually bid upon and only 1.71 bidders per tract offered. One-half of the tracts offered received no bids.

47. During the leasing period from 1954 to 1972, the Federal Government leased numerous tracts for which there was no competition, thus awarding the tract to the only bidder. Of the thirty lease sales held during that time, in nineteen of them the Government awarded thirty percent or more of the tracts to a single bidder. In eighteen of the thirty lease sales, more than one-half of the tracts leased received only one or two bids. Because of this low figure, potential lessees were aware that the number of competitors for any given tract would likely be small and that, in many cases, there might be no other competing bids.

48. The post-1972 market changes discussed in paragraph 30, *supra*, greatly increased the anti-competitive bias inherent in the cash-bonus, low-royalty leasing system. The leasing of increased acreage per year has placed even greater capital pressures on bidders since more cash bonuses have to be paid to assure proportional access to sources of supply. Competitors are also required to expend their available cash over a greater number of leases, thereby reducing the percentage of leases for which they can aggressively compete.

49. The absolute amount of bonuses paid under the cash-bonus, low-royalty bidding system increased sharply beginning in 1972. The size of these front-end payments further increased the difficulty of entry for smaller, independent companies. Whereas the average of bonus bids for all previous leasing years had been slightly under $320,000,000, bonus payments in 1972 totalled $2,251,347,556. The bonus payments rose to $3,082,462,611 in 1973 and to $5,022,860,815 in 1974. Bonus payments were $1.1 billion in 1975, $2.2 billion in 1976 and $1.6 billion in 1977.

50. As a result of these pressures, competition for tracts from 1973 to 1978 was even further reduced. The average number of bids per tract bid upon at lease sales

during that period ranged from 1.16 to 5.97, with an average per lease sale of 2.77, and the average bids per tract offered declined to 1.26. In thirteen of the eighteen lease sales, the average number of bidders per tract averaged 3 or less. A high number of tracts was leased to a single bidder or to one of two bidders. Fifty-seven percent of the tracts offered received no bids at all.

51. The number of joint ventures under the cash-bonus, low-royalty system also has had a negative impact on bidding competition for offshore leases. During the 1954-1972 leasing period, joint ventures accounted for a significant percentage of the dollar amount of winning bids. In nine of the fourteen years in which lease sales were held, over forty percent of the dollar amount of the winning bids was submitted by joint ventures. In the period from 1968 through 1973, joint ventures accounted for approximately seventy-five percent of the value of the winning bids. Over sixty-one percent of the winning bids were by joint ventures that included one or more of the twenty largest companies, and twenty-seven percent were accounted for by joint ventures that included only the twenty largest oil companies. Joint ventures not only restrict competition in the leasing market, but also increasingly concentrate the ownership of, and control over, oil and gas resources from the Outer Continental Shelf. See paragraphs 55-59, *infra*.

52. The tendency toward higher cash bonuses increased the number of joint ventures after 1972. Whereas joint ventures before 1972 had typically accounted for somewhere between 40 and sixty percent of the dollar amount of the winning bids, an already high proportion, they accounted for 75 to ninety-two percent of the dollar amount of winning bids in 1972 through 1974.

53. Joint ventures also encourage potential competitors to share information about prospects and plans for development of the Outer Continental Shelf. This exchange of information has tended to reduce competition in offshore leasing among the companies because of their shared interests and disclosures.

54. Inadequate bidding has a direct effect on the success of a particular bidding system. Indeed, a 1976 Interior report, discussing figures from offshore lease sales, noted the high positive correlation between the number of bidders on a tract and the amount of the high bid. *Joint Bidding for Federal Onshore Oil and Gas Lands, and Coal and Oil Shale Lands at 16-17* (June 1976). When the Federal Government has leased tracts with inadequate competition, therefore, the likelihood of receiving fair market value has been severely diminished.

C. *The Cash-Bonus, Low-Royalty System Has Concentrated Control Over Offshore Oil and Gas Resources in the Largest Oil and Gas Companies.*

55. The cash-bonus, low-royalty system leads to concentration of outer Continental Shelf resources under the control of larger, integrated oil companies. The cash barriers to active participation in leasing and the magnitude of risks placed on the lessees inhibit the acquisition of leases by smaller, independent operators.

56. The cash-bonus, low-royalty system has resulted in a large percentage of lease acquisitions by a small number of companies. During the leasing period from 1954 through 1972, the four largest winning bidders in a particular year frequently accounted for more than sixty percent of the total dollar amount of winning bids. The eight largest winning bidders in a particular year typically accounted for three-quarters or more of the dollar value of the winning bids. In any particular year, therefore, the resources leased by the Federal Government were likely to be distributed among relatively few companies.

57. During the period from 1954 through 1972, with the exception of only four years, the eight largest producers of crude oil in the United States accounted for over fifty percent of the dollar value of the winning bids. The twenty largest producers usually accounted

for over eighty percent of the dollar amount of the winning bids. During the period from 1968-72, for example, the eight major companies (Exxon, Texaco, Gulf, Shell, Standard Oil of California, Standard Oil of Indiana, Atlantic Richfield, and Mobil) accounted for 77%, 94%, 60%, 96% and 42% of the winning bids; the twenty major companies (the eight majors plus Union Oil, Getty Oil, Sun Oil, Continental Oil, Marathon, Phillips Petroleum, Cities Service, Amerada Hess, Tenneco, Champlin (Union Pacific), Standard Oil of Ohio, and Ashland Oil) accounted for 94%, 100%, 82%, 100% and 77%. These figures indicate not only that the control of offshore resources is concentrated in relatively few companies but also that those companies are generally among the largest oil companies in the United States.

58. Concentration of the now more valuable offshore resources has continued since 1972. In lease years from 1973 through 1978 the eight majors obtained from 53 to sixty percent of the tracts leased, while the twenty majors acquired 67 to eighty-seven percent.

59. The federal leasing program from 1954 through 1978 was not successful in increasing competition for federal oil and gas leases. To the contrary, the use of the cash-bonus, low-royalty bidding system encouraged concentration, rather than distribution, of federal oil and gas resources.

D. *The Cash-Bonus, Low-Royalty System Has Not Expedited Development of Offshore Resources.*

60. Although the 1953 Outer Continental Shelf Lands Act sought to expedite exploration and development of the Outer Continental Shelf, the cash-bonus, low-royalty system adopted by the Secretary and used in nearly all lease sales conducted under the Act has not served that need effectively. By its nature, that system at the outset absorbs large amounts of cash that would otherwise be available for rapid exploration and development. Moreover, cash-bonus, low-royalty leases have traditionally

been acquired by the largest oil companies, which have counterincentives to development of domestic oil production and which have not rapidly or extensively developed their leases for energy production.

61. Cash-bonus, low-royalty leases have traditionally been acquired chiefly by major oil companies, many of which derive a substantial share of their assets and revenues from overseas production. From 1969 to 1977 foreign holdings of the twenty majors and seven other companies (the "Chase Group") supplied these twenty-seven companes with 200-400% more crude oil than their United States holdings. In that period, the companies reduced their domestic production while increasing their acquisitions of crude oil from overseas production.

Source of Crude Oil (in Thousand Barrels Per Day)

	United States	Rest of the World
1969	6,417	19,826
1970	6,814	23,260
1971	6,747	24,900
1972	6,730	26,590
1973	6,570	28,653
1974	6,173	27,893
1975	5,891	22,944
1976	5,587	24,167
1977	5,668	24,742

62. The heavy involvement of the major oil companies in foreign production has provided them with strong counterincentives to rapid exploitation of their domestic oil resources. Although domestic profits are high, even the oil industry's own calculations show that profits on their foreign operations are higher.

a. Industry indicators show that the twenty-seven members of the Chase Group received greater and more immediate benefits from the increasing world oil price on their non-United States properties than on domestic investments. Indeed, their indicated rate of return on

their foreign properties was almost 100% greater than their domestic rate of return in some years.

Rates of Return On Average Invested Capital

	United States	Rest of the World
1969	10.9	11.2
1970	9.9	11.10
1971	9.3	12.5
1972	9.3	9.9
1973	10.5	20.9
1974	14.6	23.9

b. The twenty major United States oil companies also have been receiving significant special incentives from United States tax law and policy for their foreign operations, most notably the Foreign Investment Tax Credit. The Foreign Investment Tax Credit was designed to encourage American corporations, including oil corporations, to pay their tax obligations incurred in foreign countries as a result of their operations in those countries by allowing any payments so made to be credited against any domestic taxes owed. In practice, however, it has operated to provide an extra benefit to oil operations abroad because it allows multinational companies to receive a tax credit for payments that would otherwise be considered as royalties or other ordinary business costs of acquiring oil. The sheltering effect of the foreign tax credit, and other tax concessions, has been so great that the multinational oil companies pay the lowest average rate of income tax of any major industrial group. In 1972, United States income taxes paid by major domestic oil companies amounted to the following percentages of their foreign and domestic income: Exxon, 6.5%; Texaco, 1.7%; Mobil, 1.3%; Gulf, 1.2%; and Standard Oil of California, 2.1%.

c. The incentive and opportunity for the majors to stress their foreign production was further enhanced

upon termination of the Mandatory Oil Import Program in 1973. Under the Mandatory Oil Import Program in effect from 1959 to 1973, foreign oil imports had been restricted in the eastern United States to 12.2% of domestic production and in the West to the difference between demand and domestic supply. The new program raised the ceiling considerably, to 2 million barrels a day, in the eastern United States and in California, to 670,000 barrels a day, most of which could be acquired by the major companies under favorable production or supply contracts with foreign producers.

d. Another significant incentive to the major oil companies for preferring their foreign oil production has been the world political situation. In 1973 and 1974 several countries, including Libya, Iran, Kuwait, and Iraq, nationalized their oil production. The OPEC nations began to play an assertive and aggressive role in world oil policy and the companies' ability to continue their domination of their foreign operations seemed less sure, militating toward rapid exploitation of their remaining foreign resources and contracts. In contrast, domestic oil prices lagged behind world prices, and the companies had incentives to exploit domestic resources more gradually to stimulate, and then realize benefits from, future price increases.

63. The foregoing counterincentives have resulted in nonexploitation of federal Outer Continental Shelf leases held by major companies with foreign oil resources.

a. On the Outer Continental Shelf, oil production has decreased from a 1971 high of 418.5 million barrels to 292 million barrels in 1978. This decline in production on the Outer Continental Shelf has come despite very significantly increased acreage under lease. Indeed, the number of barrels of oil produced in 1977, when almost 15 million acres were under lease, was less than in 1971 when only 7.25 million acres had been leased on the Outer Continental Shelf.

b. Despite the great acreage increases, there has been no actual or proportionate increase in the indicia of de-

velopment: *e.g.*, exploration permits, number of crews engaged in seismic exploration, line miles of seismic exploration, new wells. Only seventy-two more permits for OCS exploration were issued in 1977 than were issued in 1974 (1974: 400; 1977: 472). There were, on a monthly average, fewer crews engaged in seismic exploration in 1978 than in 1974. Indeed, the monthly average has decreased each year since 1974. Line miles of seismic exploration have likewise declined on the Outer Continental Shelf, from 28,482 in 1974 to 10,390 in 1977. The number of wells completed in any year since 1971 has yet to reach the 1970 high of 605 wells completed.

c. Specific lease analysis also indicates that leases are not being promptly developed and brought into production. Although diligent lessees can be producing significant quantities of hydrocarbons within one year, from 1967-1974 only two percent of producing leases (and 0.5% of all leases) commenced production within one year of lease acquisition. Indeed, less than one-half of the producing leases (and only 10.9% of all leases) were brought on production within four years. See Appendix D. The delay in production averaged more than four years on leases already producing, and that figure will necessarily rise as nonproducing leases already beyond the four-year period begin production.

d. A recent report by the Comptroller General further shows that development of Outer Continental Shelf resources has been laggardly. *Policy Needed to Guide Natural Gas Regulation on Federal Lands* (June 15, 1979). Studying tracts leased in two lease sales in 1970 and 1972 to determine whether lessees had promptly developed natural gas resources, the Report found that "[n]early half of the leases in the December 1970 sale on which economically producible quantities of natural gas had been found were not producing at the end of the primary [five-year] term. A number of the December 1972 leases were not explored until later in the primary

[five-year] term, and some leases [sixteen percent] were never drilled." *Id.* at iii. Moreover, twenty-four percent of the 1970 leases and sixteen percent of the 1972 leases were classified in 1977 as "producible shut-ins": leases having oil or natural gas in producible quantities that are not being produced. Without forceful oversight by the Department of the Interior, lessees may keep these resources in the ground to await price rises rather than develop them expeditiously to relieve conditions of serious shortage.

64. Development and production can proceed more expeditiously in a more competitive environment. Smaller, independent companies, with much less cash flow and in greater need of quick returns on investment, have an incentive to exploit their Outer Continental Shelf leases more rapidly. Such companies typically do not have the capital to accumulate an inventory of unproduced oil and gas but must bring their resources to the market in a prompt manner.

65. The cash-bonus, low-royalty method of leasing Outer Continental Shelf lands has not achieved the goal of the 1953 OCS Act to promote the prompt development of domestic oil and gas resources.

E. *The Cash-Bonus, Low Royalty System Has Not Provided a Fair Return for Public Resources.*

66. Although the OCS Act has always contemplated that the Secretary should sell oil and gas resources only for a fair return, the inherent shortcomings of the cash-bonus, low-royalty bidding system have prevented the Government from obtaining its legitimate share of the "economic rent" from federal offshore leases. The "economic rent" from a lease is that amount of profit that exceeds the normal rate of profit necessary to attract investment to the enterprise. If lessees are receiving the bulk of the economic rent from offshore activities, the Federal Government is not receiving a fair return for its resources and is subsidizing undeserved or windfall profits for the lessees.

67. The offshore leases granted from 1954 through 1970 by cash-bonus bidding and 16⅔% royalty agreements surrendered the bulk of the economic rent from federal property to the oil companies while they yielded the Government an effective share of total production value far lower than experience shows companies willing to yield under a variety of royalty-bidding, sliding-scale royalty, profit-sharing and other offshore leasing arrangements. The overall return to the companies on the 1954-1970 leases is sixty-six percent of the revenues derived from oil and gas production. (See Appendix D.) The Government will thus receive only thirty-four percent of that value through cash bonuses and royalty payments (*id.*). These percentages are derived by adding to the cash bonuses paid from 1954 through 1970 the royalties payable to the Government during the life of all the productive leases awarded in that period (*id.*). While the cash bonuses in strict dollar terms add only about five percent to the 16⅔% royalty receipts on the leases, the aggregate yield to the Treasury increases to 27.8% after correction for the extra inflation value of cash bonuses received when the dollar was more valuable; it reaches a total federal share of thirty-four percent after additional correction for the investment value of the up-front cash bonus payment (*id.*). Thus, even after fullest allowances for the extra value of cash payments received in advance, the leasing experience shows that the Government will receive only one-third of the revenue from its own resources leased between 1954 and 1970 under the cash-bonus, low-royalty arrangement.

68. During the period from 1970 through 1978, the cash-bonus, low-royalty bidding system will likely show even less fair value to the United States. Whereas that system granted a one-third share to the United States in leases through 1970, the largest portion of oil and gas production under those leases was realized before the price of oil and gas increased dramatically in the mid-1970's. Because leases since 1970 will realize their pro-

duction under vastly increased prices, the effective return to the United States will be even lower. This effect is demonstrated by examination of the offshore leases granted in 1970: since their production is being yielded mostly under far higher prices, the calculation of the government's share of total production value, including both the cash bonuses and the royalties, drops significantly to thirty percent. See Appendix D, *infra.*

69. The experience of the United States under the cash-bonus, low-royalty system compares unfavorably with results from the use of other available bidding systems. Other governments and the United States itself have leased mineral lands under procedures that retain a higher proportion of revenues from the leases. Similar revenue gains could have been made by the Federal Government if it had not relied almost exclusively on cash-bonus, low-royalty bidding procedures.

70. As discussed in paragraphs 18-19, *supra*, it was apparent before passage of the Outer Continental Shelf Lands Act of 1953 that state governments had been able to obtain higher royalty payments from the oil companies than the Federal Government had received on its onshore leases. One Senator, noting the difference, said that

> "[t]he fact that Federal leases are so much cheaper than State leases gave rise to the entire submerged lands controversy." "Submerged Lands": Hearings on S.J.Res. 13 *et. al.* Before the Senate Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. 210 (1953).

The 1953 Act, by granting to the Secretary the authority to use differing bidding systems, did not intend to limit the Secretary to obtaining low-royalty payments, but contemplated that he obtain for the public at least the same return received by other lessors.

71. On March 12, 1947, the City of Long Beach, California, entered into a drilling and operating contract, pursuant to a public bidding procedure, under which the

contractor was to receive 5.9% of the proceeds of the sale of oil and gas produced thereunder, and the City was to receive 94.1% of the proceeds. Costs for drilling, maintenance and operations were to be paid from the share retained by the city, but in any event the City of Long Beach was guaranteed a net minimum of 60.1% from the lease.

The March 1947 lease was only one of several offshore leases granted by the City of Long Beach. According to the Long Beach City attorney,

> "[t]o November 30, 1947, the actual net cash received by the City under one of said contracts exceeded fifty-four percent, and the smallest amount under any said contract exceeded forty-one percent of all revenue derived from the sale of oil produced thereunder, plus millions of dollars' worth of oilfield equipment, in addition to 100% of the resulting dry gas—excepting the amount required in the developing operations—sold at additional profit to the City. The average net cash received by the City to November 30, 1947, under said six contracts, was forty-six percent of all revenue derived from the sale of oil produced thereunder." "Title to Submerged Lands Beneath Tidal and Navigable Waters": Hearings on S. 1988 and Similar House Bills Before the Senate Committee on the Judiciary and the House Committee on the Judiciary, 80th Cong., 2d Sess. 785 (1948).

72. The City of Long Beach also operates Tract 1 of the Long Beach unit as Trustee for the State of California. The Long Beach unit is part of the Wilmington Oil Field, the second largest producing field in the United States. Long Beach leased Tract 1 in 1965 on a net-profits bidding basis, under which the lease was awarded to the bidder agreeing to pay Long Beach the highest percentage of profits from the lease. The high bid called for Long Beach to receive approximately 96.4% of the net profits from the lease.

The City of Long Beach did not place upon bidders the significant risk of high capital outlays and drilling uncertainty. Before the lease sale was held, the City drilled core holes on the field to determine the extent and quality of the available oil and gas. This information was made available to bidders prior to the sale.

Over the ten years ending on April 1, 1975, the City of Long Beach received net profits of $466.2 million. This figure represents approximately forty-eight percent of total gross revenues ($976.2 million). Moreover, the State Lands Commission and The City of Long Beach have charged in litigation that this figure would have been greater if it had not been depressed by illegal conduct by the lessees. *City of Long Beach* v. *Standard Oil Company of California*, No. 75-2232 (C.D. Cal.).

73. Further demonstration of the absence of fair return from cash-bonus, low-royalty leasing is found in the Department of the Interior's own experience with leasing by other methods. The Secretary departed from the cash-bonus, low-royalty bidding procedure for ten tracts in OCS Sale No. 36 conducted in October 1974. Those tracts, selected at random on each of ten separate structures, were offered for competitive bidding of the royalty rates with a fixed bonus of $25 an acre.

The companies submitted high royalty bids on eight of the tracts offered. (The other two tracts received no bids at all.) In contrast to the normal 16⅔% royalty, the successful bidders in Lease Sale No. 36 offered the following royalties: 51.8%, 56.8%, 57.8%, 60.3%, 70.8%, 70.8%, 73.5% and 82.2%. Furthermore, competition for the tracts was high. Although the tracts offered on a cash-bonus, low-royalty basis at the same sale received an average of 2.2 bids per tract, the tracts offered on a royalty-bid basis received an average of 7.1 bids per tract. The royalty sales also attracted new bidders to the lease sale market, broadening the competitive base.

74. The Secretary waited three years before again resorting to royalty bidding, in the Cook Inlet Sale held

in October 1977. For this sale, royalty bids ranged as high as sixty-three percent of revenues from the leased tracts. Eight of the thirty tracts offered on a royalty bid basis were leased for royalties in excess of fifty percent, and seventeen tracts commanded royalties over forty percent. Use of the royalty bidding system also stimulated participation by companies that have not regularly bid under a cash-bonus, low-royalty bidding system.

75. The Secretary has also been able to obtain a higher percentage of royalties, apparently without a decrease in cash bonuses, by use of a sliding-scale royalty. Since early 1978, for example, the Secretary has conducted five lease sales using cash-bonus bidding and a sliding-scale royalty system that provides for royalties beginning at 16⅔% and increasing to as much as sixty-five percent as the value of production increases. An April 17, 1978 Department of the Interior Study of one such sale (No. 43) concluded that there was "no significant difference" in "the relative amounts bid between fixed royalty or sliding scale tracts," despite the far higher royalties on the sliding scale tracts. Indeed, the two most successful of the five sales actually showed more bids and also higher bonuses in relation to the Government's tract evaluations on the sliding scale acreage than on the 16⅔% acreage in the same sales.

76. When oil companies lease their own lands for exploration by independent producers, they seek to retain a greater interest in the ultimate value of production than the Federal Government requires them to surrender as lessees under the cash-bonus, low-royalty system.

77. Foreign governments also have pursued more advantageous leasing programs. The leasing of tracts in the United Kingdom sector of the North Sea for oil and gas exploration began in 1964. The British Government has used a two-stage leasing system, separating exploration activities from production. Initially, payments to the Government for a production license included a 12½% royalty, plus a fixed payment of 6,250 pounds per average

100 square mile block for the initial six-year period. Additional, and higher, rental payments were required for subsequent years. In later leases, the British Government raised the amount of the initial payment and annual rent.

Unlike the United States, the British Government reacted to the Arab oil embargo and the subsequent increase in oil prices by adopting a different leasing system. A White Paper issued in July 1974 noted that

> "[d]uring the past year the world price of oil has more than quadrupled: the average f.o.b. price of Middle Eastern oil, a year ago about $2.00 per barrel, is now $9.00-$10.00. If prices remain high and with the high production now expected, profits on our offshore oil will be enormous. . . . Under present arrangements, tax and royalty will take a relatively small portion of profits in the early years, and would never take much more than half. The result is that North Sea licensees would reap enormous and uncovenanted profits on their investment."

The Government sought to amend its system "[t]o secure a fairer share of the profits for the nation and to maximise the gain to the balance of the payments."

The new system of development licenses implemented by the British Government generally required a royalty of 12½% plus a petroleum revenue tax of forty-five percent plus a fifty-two percent corporation tax on net revenue. Including the profits of the British National Oil Company, a fifty-one percent participant in all North Sea leases, it has been estimated that the Government's share of profits is approximately seventy percent. Nevertheless, the British Government is continuing to experiment with alternative systems to assure maximum development and return.

78. The Government of Norway also has used a two-stage system, separating exploration and production. Production licenses have been issued for blocks of ap-

proximately 129,000 acres each, under a license valid for six years. At the end of the six-year period, the Government has required licensees to surrender fifty percent of the licensed area, except that they need not surrender any area where petrolum discoveries have been made. The licensees have been permitted to hold the retained area for an additional thirty years.

The Government of Norway has received a high percentage of the revenues from its leases. Cumulative charges have included (1) a one-time fee for the first six-year concession period, (2) an area fee beginning with the seventh year, (3) a royalty of from 8 to sixteen percent of the value of production, (4) a production bonus of approximately $5,000,000 within thirty days of the day that production reaches 250,000 barrels a day and approximately $10,000,000 within thirty days of the day that production attains 400,000 barrels per day, and (5) income taxes of 50.8% of corporate profits. After the Arab oil embargo and the swift rise of prices, the Norwegian Government acted to impose a special windfall profits tax of forty percent (subsequently lowered to twenty-five percent). It has been estimated that the Government could receive as much as seventy-five percent of the revenue from its leases, with an average somewhere between 57 and sixty-six percent.

79. Most other foreign countries also have separated the exploration and development phases and retained for themselves a far higher participation in oil and gas revenues than is enjoyed by the United States. Indonesia, for example, has received a sixty-five percent share of production revenues from its oil, once the contractor has recovered expenses. Likewise, it has been estimated that Burma has received a seventy percent share, after accounting for costs, without relinquishing legal title to its oil resources. Greenland has received a 12½% royalty and imposed a tax of fifty-five percent of net production profits. It also has reserved the right to insist upon a fifty percent participation and to require partial surrender of concession areas.

80. The figures set forth in the preceding paragraphs indicate that companies are willing to pay far higher royalties than have been required in order to obtain leases in the Outer Continental Shelf. Use of a royalty bidding system or a net profits bidding system enables the Government to capture a higher share of the economic rent, to stimulate competition for leases, to increase the prospects for distributing resources among a larger number of producers, and to prevent nonexploitation of resources by large, multinational companies.

81. The payment of cash bonus at the inception of a lease has proved an insufficient method of recapturing the difference between a 16⅔% royalty and the higher royalties (or share of net profits) that may be obtained through use of other bidding systems.

F. *The Cash-Bonus, Low-Royalty Bidding System By Its Very Nature Cannot Assure Receipt of Fair Value.*

82. The failure of the cash-bonus, low-royalty system to assure or achieve receipt of fair value has not resulted from a unique set of circumstances but is an inevitable consequence of the system itself. The United States is not a full partner in the offshore drilling experience, with a commensurate share of the risks and benefits. Rather, it sells a resource of unknown value by auction and hopes that a substantial part of its ultimate recovery will be received in advance by the cash bonuses. The Government in effect gambles that the initial bonus payments, for both producing and nonproducing lands, will capture a fair share of revenues from production on successful tracts. This gambling process cannot assure the receipt of fair value for the public.

83. Although the inherent weaknesses of the cash-bonus, low-royalty system can be lessened by acquiring reliable information about the value of the resources prior to sale, that has not occurred. See Paragraphs 34-41, *supra*. At the time of bidding on a cash-bonus, low-

royalty lease, therefore, a potential lessee must discount in his cash-bonus bid for the risks and uncertainties of discovery, exploration and development costs, and future prices and demand. The Government must make similar speculations in deciding whether to accept or reject the offered bids. Because the uncertainties are great, and the variables so numerous, it is impossible to assure that cash bonuses will offset the low royalties that the United States can receive under the 16⅔% royalty rate.

84. In addition, the cash-bonus, low-royalty system inevitably reduces the level of bidding competition that might compensate for lack of adequate information. Smaller, independent producers are inescapably excluded from the bidding process by the high up-front capital requirements and the unacceptable risks that the system imposes. Fair value cannot be assured in the absence of sufficient information or vigorous competition for tracts.

85. The cash-bonus, low-royalty system, because of the risks that it imposes on lessees, not only reduces the number of bidders but necessarily tends to depress the level of bids that it does attract. *See Department of Energy, Report to Congress on Various Options Used in FY-78 Lease Sales on the Outer Continental Shelf*, at 13 (1974). When potential lessees are risk-averse, they will underbid for leases and reduce the overall return to the Federal Government. Other systems of awarding leases, like royalty bidding systems or net-profit bidding systems, reduce the impact of initial uncertainties and consequently allow greater participation for the public in the revenues later generated from its own resources.

86. It is true that, as a result of the cash-bonus, low-royalty system, and the lack of reliable information, the Government in some instances has received significant payments for the right to develop oil and gas resources that prove not to exist. Because neither the lessees nor the Government has sufficient information at the time of leasing, a certain percentage of exploratory wells drilled

by lessees may turn out to be dry holes. However, there can be no assurance that the payments for dry holes will offset the low-royalty return to the Government on successful drilling. Moreover, the high expenditures for cash bonuses reduce the funds available for development of more promising tracts.

87. The innate advantages of a leasing system that shares risks and profits over a cash-bonus, low-royalty system were noted in a March 25, 1977 memorandum from Economist Marshall Rose of the Office of Policy Analysis, Department of the Interior, to the Acting Deputy Assistant Secretary—Program Development and Budget, which stated:

> "The profit-sharing system has the advantage of enhancing competition and reducing private risks, without inducing the inefficiencies in exploration, development, and production decisions that are caused by royalty systems. As a result, compared to a royalty system with the royalty rate fixed at any desired level, we can find a profit-sharing system that generates more government receipts and simultaneously encourages higher levels of production."

88. The cash-bonus, low-royalty system inherently does not, and cannot, fulfill the objectives of the Outer Continental Shelf Lands Act.

Section IV: Recognition of the Failure of Cash-Bonus, Low-Royalty Leasing and the Movement for Reform of the Federal Leasing Program.

8. Beginning in the early 1970's there developed substantial recognition by government agencies and defendants themselves that the cash-bonus, low-royalty leasing system was a failure.

A. *Federal Recognition.*

90. In September 1974, the National Science Foundation published a report entitled "An Economic Analysis

of Alternative Outer Continental Shelf Petroleum Policies." That report noted

> "the limited development of leasing policy over the past two decades is in sharp contrast with the dramatic changes in economic conditions and social objectives. Specifically past leasing strategies have not been changed in response to increased petroleum price and development cost uncertainty or to the increased geologic uncertainty associated with greater reliance on and acceleration of leasing on the OCS. . . . Moreover, the recent single 'energy crisis' has substantially renewed concern with issues of market power in the petroleum industry and with the adequacy and optimal allocation over time of resources." *Id.* at 6.

The Report also stated that "[d]ue to risk, private enterprise tends to underinvest in exploration and development," *id.* at 6, and suggested consideration of profit-sharing bidding systems, which "reduce[] all three categories of risk—geologic, development cost, and petroleum price." *Id.* at 7. The Report pointed out that, in addition

> "[r]isk, and thereby many problems of OCS leasing, can be reduced through the collection and utilization of more information on the petroleum production potential of the OCS." *Id.* at 8.

91. A March 19, 1975 report by the Comptroller General, entitled "Outlook for Federal Goals to Accelerate Leasing of Oil and Gas Resources On the Outer Continental Shelf," observed that "[u]ntil 1971 there was little orderly planned development of the Shelf. The Shelf oil and gas leasing program was influenced heavily by industry interest and the desire to generate revenues for the Treasury." *Id.* at i. The Report went on to criticize the accelerated leasing program adopted by the Secretary in 1973, stating:

> "The lower quality and/or lack of evaluation made necessary by inadequate staffing will mean increased reliance on bid-competition as the only means to insure that fair market value is received for leased resources. The Government's tract selection and valuation practices are inadequate even at much slower leasing rates." *Id.* at iv.

Regarding the effective level of competition, the Report warned that

> "[t]he eight largest petroleum companies are expected to secure a substantial share of the acreage to be leased in the initial offers of frontier acreage of the Atlantic and Alaska. The smaller petroleum companies are not expected to be major competitors for the frontier Shelf areas because of high risks and costs associated with their exploration and development." *Id.* at v.

92. A second report by the Comptroller General entitled "Outer Continental Shelf Oil and Gas Development—Improvements Needed In Determining Where to Lease and At What Dollar Value," provided additional criticism of the Federal Leasing Program. That report concluded that

> "the Federal Government's Shelf evaluation programs [1] are hindered by inadequate data and analysis, [2] do not reasonably insure that a fair market value return is received on lease offers of Shelf oil and gas resources, and [3] are being jeopardized by an accelerated leasing pace." *Id.* at ii.

The Report found that

> "[n]either Government nor industry has the geological data essential for adequately determining if geological characteristics necessary for petroleum accumulation exist in the wildcat tracts, or the frontier Shelf areas. . . . Under present practice exploratory drilling generally is not done until after leasing.

> Consequently, the Government and industry have to rely on geological inference and speculation as to whether petroleum actually exists." *Id.* at 7.

The Report also pointed out that undervaluation of resources by the Government results in the payment of less than a fair return by industry, stating:

> "[T]his is a critical point since these are the public's resources and it is the Government's job to not give them to industry for less than they are worth." *Id.* at 17.

The Report concluded that

> "[a]lthough one should recognize that the numerous factors which constitute the valuation process are difficult, if not impossible, to quantify with certainty, the fact is that the Government is not doing all that it can to reasonably insure fair return on the disposition of oil and gas Shelf resources." *Id.* at 33.

93. In March 1977, the Comptroller General issued another report, entitled "Outer Continental Shelf Sale No. 35—Problems Selecting and Evaluating Land to Lease." This report found again that the Secretary had inadequate information to assure that the Government would receive a fair value for the public's resources:

> "The Department [of the Interior] selected tracts for lease after reviewing only minimal and inadequate data and before assessing the true resource development potential of the land." *Id.* at ii.

Because the data were so inadequate, "estimates of tract values were not reliable and could not reasonably assure that the public received a fair market value return from the leases." *Ibid.* The Report was also critical of the level of competition:

> "The results of this sale also indicated a lack of competition; of the 231 tracts offered only 70 received bids. The majority of the tracts bid on (70 percent) received only one or two bids." *Ibid.*

94. In June 1977, the Comptroller General issued a similar report with regard to Lease Sale No. 40. That report, entitled "Outer Continental Shelf Sale 40—Inadequate Data Used to Select and Evaluate Lands to Lease," again concluded that "Interior selected tracts for lease after reviewing limited and insufficient data and before assessing the true resource development potential of the land." *Id.* at i. Indeed, the Report found that "Interior had less overall information to use in evaluating Sale 40 then in did for Sale 35." *Id.* at ii.

95. In June 1978, the Comptroller General issued another report entitled "Lower Cook Inlet—Another example of More Data Needed for Appraising Outer Continental Shelf Oil and Gas Resources." This report stated:

> "The Department of the Interior's policy of leasing Outer Continental Shelf lands that have not been properly evaluated (because of limited data) encourages industry to tie up capital in lands with minimum or no resource potential or buy lands for less than fair market value." *Id.* at i.

The Comptroller General specifically found that "sale evaluations [for the Cook Inlet sale] were made with limited and poor quality data and therefore were unreliable." *Id.* at ii. The Report also stated:

> "A competitive leasing program is based on the premise that competition will provide a fair market return. In its two previous reviews, GAO found that more than half of the tracts bid on got only one or two bids. For this sale about sixty percent of the tracts receiving bids got only one or two bids each. In cases such as this when competition is limited or does not exist, it becomes increasingly important for accepting or rejecting industry bids." *Id.* at ii.

96. In April 1978, the Federal Trade Commission advised the Department of the Interior of its concern about

competitive effects that might result from Lease Sale No. 43. "Comments of the Bureau of Competition of the Federal Trade Commission to the Department of the Interior on OCS Sale 43 (Southeast Georgia Embayment." The Commission asserted that

> "potential entrants into Atlantic Coast OCS crude oil production are being deterred by existing industry structure and that control of crude reserves will be further concentrated in the hands of the larger international companies and other majors thus adversely affecting price and output as well as the future downstream structure of the industry." *Id.* at 6.

The Commission also noted "the high concentration of refinining capacity and the tendency of the largest refiners to purchase the majority of leases for OCS tracts and to foreseeably control any pipelines serving those tracts." *Id.* at 7. The Commission said that

> "in order to minimize the disincentives and other concerns currently faced by small and independent producers in entering OCS bidding and production, we recommend that the Department of the Interior further experiment with alternative lease payment systems (sliding scale royalty, etc.) and provide as much advance notice as possible to such potential entrants regarding the tracts as to which the experimental approach will be applied." *Id.* at 23.

97. As set forth more fully elsewhere, see paragraphs 87, 99, 103-104, the cash-bonus, low-royalty leasing system was criticized not only by other federal bodies but also by Secretaries of the Interior and Interior staff members, who expressed doubt that the cash-bonus, low-royalty system has secured fair value, particularly in a time of rising prices, and admitted that a net profits system would provide more government receipts and greater incentives to exploration.

B. *Congressional Recognition.*

98. In October 1974, Congressman Dingell of Michigan warned the Senate Judiciary Subcommittee on Administrative Practice and Procedure that the Department of the Interior was not capable of handling the proposed expanded leasing program. Mr. Dingell said that an investigation conducted by the Small Business Subcommittee on the Activities of Regulatory Agencies showed that the Department was unable to assure "that the Government received fair value for the (OCS) tracts it leases, that the Government knows the amount of the reserves underlying the leases, or that the Government is capable of administering and supervising operations on leases once they are let."

99. In 1975, the Senate Committee on Interior and Insular Affairs and the Senate Commerce Committee held joint hearings to consider amendments to the Outer Continental Shelf Lands Act. At those hearings, there was strong criticism of the federal leasing program under the 1953 Act. Senator Bentsen stated flatly that

> "[w]hile the present system results in a large initial cash payment, the American citizen receives very little from what may be an extremely valuable oil and gas discovery on his lands. If the lease proves to be undervalued by the companies who bid on the tract, the Government has no way to share in what may be a bonanza. This becomes far more important today then it has been in the past due to higher oil prices and the President's desire to greatly increase the schedule of lease sales." "Outer Continental Shelf Lands Act Amendments. . . .": Hearings on S.Res. 45 and S.Res. 222 Before the Senate Committee on Interior and Insular Affairs and the Senate Committee on Commerce, 94th Cong., 1st Sess. 698 (1975).

Senator Bentsen also noted that

> "[o]ne of the worst features of the present system's reliance on high initial cash payments is the advantage it gives the large companies over the smaller ones—the major over the independent." *Ibid.*

A report prepared by Thomas B. Lewis for Senator Mathias stated that

> "[p]resent leasing procedures require the payment of huge cash bonuses which are prohibitive expenses to small, independent operators and effectively limit participation and competition in the OCS arena. Present procedures also allow the leasing of Federal lands which are as yet unexplored; as a result, the United States has no effective way of assuring the public of a fair return from lease sales . . . ." *Id.* at 719.

Critical views were also offered by Barbara Heller, then of the Environmental Policy Center and now Deputy Under Secretary, United States Geological Survey, Department of the Interior, who told the Committees:

> "There is no excuse . . . for the irresponsible way in which the Interior Department is proceeding with the federal leasing program. No good business man would run his business the way the Interior Department deals with our public resources. No good business man would put a product on the market without knowing what he is selling. The Interior Department does that with our public resources. No good business man would sell his goods without trying to be sure there was some competition among the buyers so that he could obtain a decent price for his goods. There is very little competition among the bidders for our public resources." *Id.* at 1155.

While opposed to amendment of the 1953 Act, Secretary of the Interior Morton conceded that

> "[t]he objectives of any bidding system must be to (a) insure receipt of fair market value, (b) provide incentives for prompt and thorough development, and (c) open access to the OCS for all firms capable of working leases in an environmentally responsible manner." *Id.* at 13.

Moreover, Secretary Morton himself admitted that

> "[o]n the Outer Continental Shelf, we have been collecting 16⅔ percent of all of the production. You might say, and I think very well say, this is not a high enough percent because we really don't get true value, if, at the time the bonus is bid, oil is selling at $5 and then it goes up to $10. The 16⅔ percent royalty is not high enough. We are examining that." *Id.* at 68.

100. In opposing amendment of the Outer Continental Shelf Lands Act, officials of the Department of the Interior testified on several occasions that they did not expect oil prices to rise significantly, if at all, during the next few decades. For example, Darius Gaskins, Director, Office of the Outer Continental Shelf, testified in March 1975 that "[t]he highest possible price we see in a 15-year period [until 1990] is $11 [per barrel]." *Id.* at 46. Royston Hughes, Assistant Secretary of the Interior for Program Development and Budget, testified before the Ad Hoc Select Committee in June 1975 that the Department, in estimating the value of projected production from a lease, used a constant price of $7.67 per barrel of oil (in present dollars) over the life of the lease. Mr. Hughes stated:

> "$7.67 is the figure we use which is the economists' prediction of what the price of oil will be 15 years from now." "Outer Continental Shelf Briefings": Hearings on H.R. 6218 Before the House Ad Hoc Select Committee on Outer Continental Shelf, 94th Cong., 1st Sess. 250 (1975).

In response to statements that the price of oil at that time was $12 per barrel, Mr. Hughes said:

> "[The price of oil] will decrease to $7.67 from $12, which is about one-third." *Id.* at 251.

101. The Committee most concerned with the reexamination of Federal OCS leasing policies was the House Ad Hoc Select Committee on the Outer Continental Shelf. Its report, issued on May 4, 1976, made several important points about the need for better administration of the federal offshore lands. H. Rep. No. 94-1084, 94th Cong., 2d Sess. (1976). In reviewing the history of federal OCS leasing, the Committee found

> "that the present law's grant of total discretion to the Secretary led to a situation where the petroleum industry had a too dominant voice in the setting of policy. . . . This close industry-Federal Government cooperation has often disregarded the interests of state and local governments and the taxpayer." *Id.* at 76.

Another concern expressed by the Committee was "that the present system provides too many advantages for industry at the possible expense of the taxpayer." *Id.* at 78. The Committee noted:

> "At present, the cash-bonus system is used almost exclusively. Under that system, in order to win a lease, a company must have vast amounts of capital, and the price to the company is set without full knowledge of the value of the oil and gas in the area. This may reduce competition for offshore leases to the major oil companies and reduce the public return for resources." *Id.* at 43.

102. Nonetheless, the Department of the Interior and the oil industry continued to oppose bills to amend the 1953 Outer Continental Shelf Lands Act. *See* Ad Hoc Committee Report at 78-79. Thus, a letter from the

Department of the Interior to the Ad Hoc Committee stated that

> "[t]he OCS Lands Act presently provides that leasing of OCS lands shall be by competitive sealed bidding on the basis of a cash-bonus bid with a fixed royalty or a bid-royalty with a fixed bonus, but in no instance can the royalty be less than 12.5 percent. The leases are for a five-year term. These provisions, coupled with the Department's geological experience and the means for acquiring such information, are sufficiently flexible for institution of the most desirable alternative leasing systems to promote competition while serving the public's interest in receiving a fair return for its resources and using those resources in the most responsible manner." Reprinted at Ad Hoc Committee Report, p. 166.

The Department represented to the Committee that it was "currently analyzing alternative bidding methods available to it under the OCS Lands Act of 1953," *id.* at 167, including "bonus bidding with increased royalty rates; royalty bidding; bonus bidding with net profit payments in lieu of royalties; net profit bidding; deferred bonus payments with forgiveness of the unpaid balance at the time of lease abandonment." *Id.* at 168. The Department also assured the Committee that "[c]urrent Departmental practices and studies are designed to assure that the lease auction[s] of OCS resource[s] are competitive to insure receipt of fair market value." *Id.* at 167.

103. After the change of administration in 1977 representatives of the Department of the Interior recognized the deficiencies of the present system and took a more supportive view of bills to amend the 1953 Act. In early 1977, Secretary Andrus, asked whether he though "in the past couple of decades . . . the public has gotten a reasonably fair return on the sale of its resources," answered that he had "a philosophical feeling that the

answer to your question is no. The public has not received what it should, but I cannot say to you or to the media, to the world, that that statement I just made is based on facts." "Outer Continental Shelf Lands Act Amendments of 1977": Hearings on H.R. 1614 Before the House Ad Hoc Select Committee on Outer Continental Shelf, 95th Cong., 1st Sess. 170 (1977). The Secretary also testified before the Ad Hoc Committee that

> "[t]he Department supports legislation providing the authority to devise, test and improve the bidding systems to be used. Flexibility is needed . . . if we are to carry out an orderly program that will assure fair return for the public resource, promote competition, and not cause distortions such as premature abandonment of production or inefficient reservoir management. We support the mandate to use alternative bidding systems, although these alternatives need not be limited to eight [bidding systems]." *Id.* at 159.

Secretary Andrus further testified:

> "The Department of Interior or the Department of Energy should have more flexibility in determining the methods of leasing and the bidding process. . . . [W]e have to look beyond today to tomorrow, and we would prefer the flexibility of a new method of bidding that would be utilized by maybe another nation or another entity that was successful. We would not want to be prohibited from using it if it would enhance competition, if it would improve the rate of return and the bidding process . . . ." *Id.* at 164.

The Secretary also noted that

> "we expressed concerns regarding the direction for federally contracted exploration. I think it is necessary that we have the flexibility and not be prohibited from moving into an area where, if we

choose, we could explore that resource ourselves and make a determination on our own as to the vastness of that resource, and then go to bid, sharing that information with the world. That would probably improve the competitive situation of that bid and give [help] some of the smaller independent companies that do not have the capabilities of the giants to know what resources are available." *Ibid.*

104. In written answers to the Ad Hoc Committee, the Department of Interior noted that

"[t]here are some disadvantages from placing most of the risk on private industry. It appears, for example, that not all segments of private industry are 'more than willing,' . . . to bear such risks. Smaller firms are less willing than large firms to bear such risks because of the likelihood that they could lose their investment and be threatened with bankruptcy by failure to find oil on any single leasehold. Larger firms have the resources to diversify their investments and survive such losses so that they can eventually find the large payoffs that are the incentive to bear such risks. Thus leaving risk to private industry tends to favor larger firms in the competition for OCS leases. This remains true even though non-majors can bid jointly. Both the elimination of some potential bidders and the formation of bidding consortia may reduce competition and may tend to reduce government revenues. The OCS Leasing Program has also been criticized because of the anti-competitive effects of cash-bonus bidding for leases on tracts whose value, before exploration, is highly uncertain. Both increased prelease exploration and alternative bidding systems are potential means of improving competition. They should be authorized so that we may implement the programs which are most effective." *Id.* at 198.

105. Despite these criticisms and other similar analyses of the Federal OCS Leasing Program, and despite the admissions made by Interior officials, the Secretary continued to adhere, with very few exceptions, to the cash-bonus, low-royalty bidding system. The Secretary did not conduct extensive exploration prior to lease sales, nor did the Secretary develop other methods to assure the adequacy of competition in the lease sale market and in the market for production and refining of crude oil.

Section V: The 1978 Amendments to the Outer Continental Shelf Lands Act: Legislative Action to Reform the Leasing Program.

106. The 1978 Outer Continental Shelf Lands Act amendments manifest Congressional dissatisfaction with the traditional cash-bonus, low-royalty leasing system. They make even more clear the need to assure a fair return to the public for its resources, to stimulate competition in the sale of leases and the production of oil, to encourage efficient exploitation and development, and to obtain adequate information to fulfill these purposes. The findings of the Act, Section 101, state that "the Outer Continental Shelf contains significant quantities of oil and natural gas and is a vital national resource reserve which must be carefully managed so as to realize fair value, to preserve and maintain competition, and to reflect the public interest."

107. Section 102 sets forth the purposes of the 1978 Act. In particular, the Act seeks to

> "preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the

resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition."

It is also a purpose of the Act to "insure that the extent of oil and natural gas resources of the Outer Continental Shelf is assessed at the earliest practicable time." Section 102(9).

108. Section 202 of the Act specifically declares it to be the policy of the United States that "the Outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public . . . ." Consistent with that policy, The Act states that "[l]easing activities shall be conducted to assure receipt of fair market value of the lands leased and the rights conveyed by the Federal Government." Section 206, amending Section 18(a)(4).

109. The 1978 amendments emphasize the need for recourse to a greater variety of bidding systems. Section 205, amending Section 8(a)(1). Bidding

> "shall be by sealed bid and, at the discretion of the Secretary, on the basis of—
>
> "(A) cash bonus bid with a royalty at not less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold;
>
> "(B) variable royalty bid based on a per centum in amount or value of the production saved, removed, or sold, with either a fixed work commitment based on dollar amount for exploration or a fixed cash bonus as determined by the Secretary, or both;
>
> "(C) cash bonus bid, or work commitment bid based on a dollar amount of exploration with a fixed cash bonus, and a diminishing or sliding royalty based on such formulae as the Secretary shall determine as equitable to encourage continued production from the lease area as resources diminish, but not less than 12½ per centum at the beginning

of the lease period in amount or value of the production saved, removed, or sold;

"(D) cash bonus bid with a fixed share of the net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

"(E) fixed cash bonus with the net profit share reserved as the bid variable;

"(F) cash bonus bid with a royalty at no less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold and a fixed per centum share of net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

"(G) work commitment bid based on a dollar amount for exploration with a fixed cash bonus and a fixed royalty in amount or value of the production saved, removed, or sold; or

"(H) subject to the requirements of paragraph (4) of this subsection, any modification of bidding systems authorized in subparagraphs (A) through (G), or any other systems of bid variables, terms and conditions which the Secretary determines to be useful to accomplish the purposes and policies of this Act, except that no such bidding system or modification shall have more than one bid variable."

The Act also states that

"[t]he bidding systems authorized by paragraph (1) of this subsection, other than the system authorized by subparagraph (A), shall be applied to not less than 20 per centum and not more than 60 per centum of the total area offered for leasing each year during the 5-year period beginning on the date of enactment of this subsection, unless the Secretary determines that the requirements set forth in this subparagraph are inconsistent with the purposes and policies of this Act." Section 205, amending Section 8(a)(5)(B).

110. The Secretary cannot use a bidding system unless appropriate regulations are in place at the time of the sale. Section 205, amending Section 8(a)(1), provides that a lease is to be granted to the highest bidder "under regulations promulgated in advance." Section 205, amending Section 8(a)(6), provides that, if any system using a net profits basis is used, regulations to govern the calculation of net profits must be in place at least ninety days prior to the notice of the lease sale. Promulgation of regulations with regard to bidding systems is the responsibility of the Secretary of Energy. See 42 U.S.C. § 7152(b).

111. The amendments also require the Secretary to notify Congress of the bidding systems to be used in forthcoming lease sales "and the reasons for the utilization." Section 205, amending Section 8(a)(8)(A) and (B). The Secretary is also required to report to Congress on an annual basis, stating the bidding systems used during the past year, the bidding systems to be utilized in the forthcoming years, the benefits and costs of using particular bidding systems, "the reasons why a particular bidding system has not been or will not be utilized," and his decisions regarding use of the cash-bonus, fixed-royalty bidding system. Section 205, amending Section 8(a)(9).

112. The 1978 amendments, like the 1953 Act, provide that the Secretary may award leases only by "competitive bidding." Section 205, amending Section 8(a)(1). In developing any bidding regulations under the Act, the Secretary of Energy must "request and give due consideration to the view of the Attorney General with respect to matters which may affect competition," and the Attorney General is required to consult with the Federal Trade Commission. Section 204. The Conference Report accompanying the 1978 Act indicates that "increasing competition" should be an important consideration in utilizing new bidding alternatives. *Id.* at 92.

113. The 1978 amendments contain numerous provisions to protect against concentration of the OCS oil and gas resources in the hands of large, integrated companies. Before the acceptance of any bids, the Secretary must allow the Attorney General, in consultation with the Federal Trade Commission, thirty days to review the results of the lease sale. Section 205, amending Section 8(c)(1). The amendments provide that the Attorney General "may, in consultation with the Federal Trade Commission, conduct such antitrust review on the likely effects the issuance of such leases would have on competition as the Attorney General, after consultation with the Federal Trade Commission, deems appropriate . . . ." Section 205, amending Section 8(c)(2). After that review, the Attorney General "may make such recommendations to the Secretary, including the nonacceptance of any bid, as may be appropriate to prevent any situation inconsistent with the antitrust laws." Section 205, amending Section 8(c)(3). The Secretary of Energy must promulgate regulations for the "fostering of competition for federal leases." 42 U.S.C. § 7142(b).

Section 205, amending Section 15(2) of the Act, provides that the Secretary must make an annual report, prepared after consultation with the Attorney General, "with recommendations for promoting competition in the leasing of Outer Continental Shelf lands." The report must contain an evaluation of authorized competitive bidding systems and their use or lack of use, the evaluation of bidding systems not currently authorized, "an evaluation of the effectiveness of restrictions on joint bidding in promoting competition," "an evaluation of present measures and a description of any additional measures to encourage entry of new competitors," and "an evaluation of present measures and a description of additional measures dealing with supplies of oil and gas to independent refiners and distributors."

The amendments also seek to increase competition among refiners as well as producers of crude oil. Any

oil and gas lease issued pursuant to the amendments must include a requirement that "the lessee offer 20 per centum of the crude oil, condensate, and natural gas liquids produced on such lease, at the market value and point of delivery applicable to the federal royalty oil, to small or independent refiners . . . ." Section 205, amending Section 8(b)(7).

114. The 1978 amendments also grant substantial authority to assure prompt development of the OCS gas resources. Section 204, amending Section 5(a)(7), specifically requires the Secretary to promulgate regulations "for the prompt and efficient exploration and development of a lease area." Moreover, the amendments require that a lessee "shall produce any oil or gas, or both, obtained pursuant to an approved development or production plan, at rates consistent with any rule or order issued by the President in accordance with any provision of law." Section 204, amending Section 5(g)(1). If no such rule has been issued,

> "the lessee shall produce such oil and gas, or both, at rates consistent with any regulation promulgated by the Secretary of Energy which is to assure the maximum rate of production which may be sustained without loss of ultimate recovery of oil or gas, or both, under sound engineering and economic principles . . . ." Section 204, amending Section 5(g)(2).

The Department of Energy is authorized, under Sections 302(b) and (c) of the Department of Energy Organization Act, to establish production rates for all federal oil and gas leases.

115. Section 205, amending 8(b)(4) of the Act, provides that any oil and gas lease shall "entitle the lessee to explore, develop, and produce the oil and gas contained within the lease area, conditioned upon due diligence requirements and the approval of the development and production plan required by this Act." Section 25(c)(5) requires that any production and development plan

specify "an expected rate of development and production and a time schedule for performance." The Secretary is authorized to cancel a lease for failure to comply with an approved plan, Section 25(j), and lessees are prohibited from bidding on new acreage "if the Secretary finds, after notice and hearing, that the bidder is not meeting due diligence requirements on other leases." Section 205, amending Section 5(d). The five-year leasing program which the Secretary must prepare, must include estimates of the appropriations and staff necessary to "supervise operations conducted pursuant to each lease in a manner necessary to assure due diligence in the exploration and development of the lease area in compliance with requirements of applicable law and regulations and with the terms of the lease." Section 208, amending Section 18(b)(4).

116. Section 26 of the 1978 amendments establishes an Outer Continental Shelf oil and gas information program. This program requires that

> "[a]ny lessee or permittee conducting any exploration for, or development or production of, oil or gas pursuant to this Act shall provide the Secretary access to all data and information (including processed, analyzed, and interpreted information) obtained from such activity and shall provide copies of such data and information as the Secretary may request." Section 26(a)(1)(A).

This Section also provides that the Secretary shall receive information from other Federal departments and agencies. Section 26(b)(1) says that "[d]ata and information provided to the Secretary pursuant to subsection (a) of this section shall be processed, analyzed, and interpreted by the Secretary for purposes of carrying out his duties under this Act." The Secretary is also required to share information with affected state and local governments.

117. Section 204, amending Section 5(b) of the Act, provides that "[t]he issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of this Act shall be conditioned upon compliance with regulations issued under this Act." Like the 1953 Act, the 1978 amendments provide that the Secretary may cancel a nonproducing lease, while a producing lease must be forfeited through a proceeding in District Court. Section 204, amending Sections 5(c) and (d).

118. Section 19 of the 1978 amendments provides that the Governor of an affected state or an executive of an affected local government may submit recommendations to the Secretary "regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan." Section 19(c) states that

> "[t]he Secretary shall accept recommendations of the Governor and may accept recommendations of the executive of any affected local government if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected state."

Section VI: Events Subsequent to Passage of the 1978 OCS Amendments: Administrative Failure to Implement the OCS Statute, Inability to Use Superior Bidding Systems, and Continued Adherence to the Discredited Cash-Bonus, Low-Royalty System.

119. Since passage of the 1978 OCS amendments, the Secretary has held three lease sales. In each sale, the Secretary relied heavily on the cash-bonus, low-royalty bidding system. Like previous sales, Lease Sales 65, No. 51 and No. 49 were conducted without adequate presale information to judge the value of the resources being

leased, and the bidding competition on Lease Sales 65, No. 51 and No. 49 was inadequate to ensure that the Government received a fair return for the leases granted. In Lease Sale 65, there was an average of 1.77 bidders per tract bid upon. Of the thirty-five tracts leased, twenty (57%) were awarded to the only bidder and nine (25%) to one of but two bidders. Sixty-one percent of the tracts offered received no bids. In Lease Sale 51, there was an average of 3.27 bidders per tract. Of the eighty-one tracts leased, sixteen (19%) were awarded to a single bidder, and twenty-one (25%) were awarded to one of two bidders. Twenty-seven percent of the tracts offered received no bids. In Lease Sale No. 49, there was an average of 1.68 bidders per tract. Of the thirty-nine tracts leased, twenty-two (56%) were leased to the only bidder, and nine (23%) were leased to one of only two bidders. Sixty percent of the tracts offered received no bids.

120. The lease sales conducted after amendment of the Act have not achieved a broader distribution of OCS resources among large and small producers. In Lease Sale No. 65, sixty percent of the tracts were obtained by the eight largest oil companies; eighty-nine percent were obtained by the twenty largest companies. In Lease Sale 51, the comparable figures were sixty-one percent and seventy-three percent. In Lease Sale No. 49, the figures were twenty-seven percent and forty-five percent. The effect of such concentration, at a minimum, is to place potential oil and gas resources under the control of companies that have counterincentives to develop them promptly or in a manner that promotes competition.

121. Prior to Sales 65, 51, and 49, the Energy Action Educational Foundation, on behalf of itself and "those who may assert similar positions," protested to the Secretary of the Interior that leases issued in those sales (and future sales conducted on a similar basis) would be in violation of the Outer Continental Shelf Lands Act and the Secretary's fiduciary obligations. See Appendix

B. Energy Action asked the Secretary to notify all prospective bidders that this claim of presumptive invalidity had been made, and Energy Action itself notified bidders at Sales 51 and 49.

122. Since September 1978, oil prices have again risen sharply, and concern has increased about sources of crude oil supply. The National Energy Plan submitted by President Carter to Congress in May 1979 warns that world oil prices could reach $55 a barrel by 1990, about $30 a barrel in current dollars, "unless there are major changes in forecasted energy production and consumption trends or efforts by Government." The projected price in current dollars would be approximately double the current price of $16.00 a barrel, which itself has risen from $12.70 a barrel in 1978. Thus, the United States is continuing to sell oil and gas resources in a time of rising prices, a situation in which former Secretary Morton conceded that recovery of a 16⅔% royalty was not enough. See paragraph 99, *supra*.

123. Although the 1978 amendments require that competitive bidding take place "under regulations promulgated in advance," and the Secretary of Energy is required to develop regulations for alternative bidding systems under 42 U.S.C. § 7152, the Secretary of Energy has not yet promulgated any new regulations. Moreover, the 1978 amendments require that regulations establishing rules to govern the calculation of net profits be adopted at least ninety days before notice of any lease sale using a net-profits system. The Secretary of Energy has not promulgated any such regulations. As a result, the Secretary of the Interior is planning to conduct lease sales without the flexibility to employ certain alternative bidding systems that would provide better assurance of fair value to the public and prompt development of oil and gas resources. Secretary Andrus has himself testified before the Ad Hoc Committee that such flexibility is needed.

"if we are to carry out an orderly program that will assure fair return for the public resource, promote competition, and not cause distortions such as premature abandonment of production or inefficient reservoir management." "Outer Continental Shelf Lands Act Amendment of 1977": Hearings on H.R. 1614 Before the House Ad Hoc Select Committee on Outer Continental Shelf, 95th Cong., 1st Sess. 159 (1977).

In addition, there are no regulations governing competitive review procedures and standards, thus making it unlikely that the Attorney General, Federal Trade Commission, or Department of the Interior can fulfill their respective responsibilities to "preserve and maintain competition," particularly in the decision whether to accept or reject particular bids. See January 18, 1979 letter from John H. Shenefield, Assistant Attorney General, Antitrust Division, to Cecil D. Andrus.

124. A very recent report by the Comptroller General makes clear that the issuance of regulations, including regulations pertaining to alternative bidding systems for Outer Continental Shelf lands, is being delayed and frustrated by jurisdictional disputes between the Department of Energy and the Department of the Interior. *Federal Leasing Policy—Is the Split Responsibility Working?* at 3, 4, 8, 10-11, 14. This continuing disagreement between the Departments has had particularly damaging effects on bidding for federal leases since Interior almost one year ago rejected draft regulations for alternative bidding systems, claiming that "the regulations would have given Energy the responsibility for implementing the regulations which is, according to [Interior officials], the Interior's responsibility." *Id.* at 10. The Report notes that "[t]he results of the disagreement between the Departments are delays in the development and implementation of regulations which are viewed as integral components of federal leasing programs," including "development and implementation of alternative bidding sys-

tems [that] could have an impact on OCS oil and gas production by bringing in more companies and thereby increasing competition." *Id.* at 11.

125. On March 15, 1979, the Secretary issued a draft sale notice for proposed sale No. 48 in the offshore waters of Southern California. Federal Register, Vol. 44, No. 57 (March 22, 1979). The notice specifies that leases on 147 tracts will be sold in June 1979. According to the notice, seventy-seven of the tracts will be awarded on the basis of a cash-bonus bid with a fixed royalty of 16⅔%. The remaining tracts will be offered on the basis of a cash-bonus bid with a sliding-scale royalty beginning at 16⅔% when quarterly production is valued at less than $10,000,000, 21.9% when quarterly production is valued at less than $30,000,000, 32.9% when quarterly production is valued at less than $90,000,000, 43.9% when quarterly production is valued at less than $270,000,000, and 54.9% when quarterly production is above that amount. No tracts will be offered on the basis of royalty bids or bids of a net-profits share. The State Lands Commission has notified the Secretary of its belief that leases issued in Lease Sale No. 48 will be in violation of the Outer Continental Shelf Lands Act and the Secretary's fiduciary obligations. See Appendix C.

126. In November 1978, the Department of the Interior issued a study saying that, on leases issued from 1954 through 1969, lessees had not received an above-average rate of return. This study was seriously flawed: it depended on uncertain or inaccurate estimates about the costs incurred by lessees in connection with the leases and it made unreliable and unrealistically low projections about future reserves. Moreover, the study focused only on leases issued before 1970; a great part of the production from those leases occurred at the prevailing low oil and gas prices of the 1960's and early 1970's, while production from later leases will be achieved exclusively at far higher, and still rising, prices. See Appendix D.

127. While leasing has been, and will be, continued under the discredited cash-bonus, low-royalty system, it has become even clearer that there are superior alternative systems. In testimony before the Ad Hoc Select Committee in December 1978, Deputy Under Secretary Barbara Heller, Department of the Interior, indicated that a bidding system based on a share of the net profits from federal leases could provide substantial benefits to the public:

> "In our bidding system tests to date we have tried to find ways to reduce bonus levels without incurring production losses. Our plans for the future focus on a system that promises to do this very well: profit sharing. Under the profit sharing system, the Government takes a share of the profits, after the operator's investments are paid out, whenever oil or gas is found and produced. This can substantially reduce bonuses, and may thus improve competition. Unlike high royalty rates, however, high profit share rates should not provide a disincentive to produce oil and gas. Even though profits are shared, they are never reduced to zero as they can be under high royalty rates. "O.C.S. Amendments of 1978—Oversight": Hearings Before the House Ad Hoc Select Committee on Outer Continental Shelf, 95th Cong., 2d Sess. 305 (1978).

Subsequently, Robert J. Kalter, Director, Leasing Programs, Department of Energy, agreed that a profit sharing system was preferable:

> "As Barbara Heller mentioned this morning, both of our agencies think that the profit-sharing system is the next major alternative system that should be implemented and in anticipation of the passage of the amendment we initiated in April a major analysis of the types of profit-sharing bidding system best suited to the Outer Continental Shelf program in the United States. The analysis encompasses the

> theory that a net profit-sharing bidding system increases competition by reducing the cash bonus bid and allows greater participation. Under such a system, the risks associated with oil and gas exploration are more equitably shared by the Government and industry. Accordingly, this could lead to more efficient utilization of capital for the exploration and development of Outer Continental Shelf oil and gas resources. *Id.* at 456.

Even more recently, the Department of Energy has submitted a report to Congress that emphasizes the disadvantages of a cash-bonus, fixed-royalty system and concludes that other systems are more desirable:

> "A bidding system that places most of the emphasis on cash bonus payments causes the lessee to bear most of the risks associated with finding or not finding commercial quantities of oil and/or gas. This could lead to significant risk discounting of bonus bids. On the other hand, the low contingency payments associated with heavy emphasis on bonus payments prevent the government from capturing the 'larger than expected' economic rents generated by large finds. These are the typical drawbacks attributed to a traditional cash bonus bidding system with a low fixed royalty. If contingency payments are set too high, it could discourage the development of marginal deposits or early abandonment of production. For these reasons, a bidding system that attempts to balance out the advantages and disadvantages of heavy emphasis on cash bonus vs contingency payments is desirable." *Report to Congress on Various Bidding Options Used in FY-78 Lease Sales on the Outer Continental Shelf*, at 13.

Despite this testimony, and similar views expressed in the 1977 memorandum from Marshall Rose of Interior, see paragraph 87, *supra*, the Secretary is proposing to conduct Lease Sale No. 48 in June 1979 by cash-bonus

bidding without any recourse to, or opportunity for, royalty bidding or net-profits bidding. *See* paragraph 125, *supra.*

128. In March 1979, the Comptroller General issued a report on Lease Sale 43, entitled "Georgia Embayment—Illustrating Again The Need For More Data Before Selecting and Leasing Outer Continental Shelf Lands." The Report noted that "the data available to select and value tracts was limited and, in some cases, less than in the prior sales reviewed, "*id.* at 2, and it observed:

> "Had more information been available on the resource potential prior to scheduling the area for sale, perhaps the area would not have been put up for lease at this time." *Id.* at 14.

The Report also emphasized that, by any criterion, "competition was very limited." *Id.* at 11. In fact, eighty-one percent of the tracts bid upon received only one or two bids. *Ibid.* The Report stated:

> "When large percentages of the total tracts in a sale receive one or two bids per tract and are minimally valued based on poor information, there can be no assurance that the public received a fair market value return for the potential resources leased." *Id.* at 10.

Section VII: Injuries to Plaintiffs Caused by the Unlawful Federal Leasing Program.

129. The cash-bonus, low-royalty leasing system causes direct economic harm to the consumers named in paragraph 3, *supra*, by denying them the price and supply benefits of the more competitive market for oil and gas that the Outer Continental Shelf Lands Act seeks to promote. Because the high risk and the cash-bonus requirement limit the ability for independent producers to bid for and obtain federal leases, most federal off-

shore oil and gas resources have been captured by major, integrated companies. If independent producers were allowed greater participation in the federal leasing program, as they would be under alternative bidding systems authorized by the Outer Continental Shelf Lands Act, consumers could secure the benefits of greater competition in the production and sale of oil and gas.

Consumers are also injured because the major companies have counterincentives to rapid and thorough development of their oil and gas resources. The consequent continuing limitation of production has led to reduced supplies of domestic oil and gas. The prompt exploitation that the Act seeks to assure, but that defendants' conduct has tended to deny, is particularly important at the present time when consumers are threatened with severe shortages of gasoline and heating oil.

130. The Federal taxpayers named in paragraph 3, *supra*, have been injured by the failure of the Government to obtain fair return, and by inadequate development of the Outer Continental Shelf resources under cash-bonus, low-royalty leasing that further reduces the income to the Federal Government by depressing the amount of royalty payments. Because the payments from OCS leasing are placed in the general fund of the Treasury, the failure of the Secretary to obtain fair value for public oil and gas resources denies revenues to the Government to the injury of the taxpayers.

131. The citizens of the United States named in paragraph 3, *supra*, are joint owners of the oil and gas resources on the Outer Continental Shelf. As such, they are beneficiaries of a trust administered by Congress, and the Secretary by delegation, for their benefit. They are injured whenever Congress gives away their property for less than fair value.

The lands of the United States, and the oil and gas produced from those lands, are a nonrenewable resource. Citizens of the United States are entitled to demand that

Congress and the Secretary exercise the utmost care in transferring those resources to private interests. The failure of the Federal Government to assure the receipt of fair value for offshore oil and gas resources has caused them significant and irreparable injury.

132. The State Lands Commission and the City of Long Beach, like the United States, have responsibility for the leasing of oil and gas lands held in trust for the public. Use of the cash-bonus, low-royalty leasing system, which is contrary to the Outer Continental Shelf Lands Act, will cause direct injury to these plaintiffs in at least three distinct ways:

a. The California plaintiffs' future ability to lease their undeveloped oil and gas lands on advantageous terms is threatened by the unduly generous and numerous low-royalty Federal OCS leases granted in the future.

b. California plaintiffs cannot be assured of production on their own leases in the future when lessees can realize higher profits under over-generous and large-yield Federal leases.

c. The very large Federal OCS properties scheduled for development over the next 20-30 years, with projected quantities of Federal oil on the West Coast approximating 220,000 barrels, per day in contrast to the very modest amount of Federal oil produced on the West Coast in the past, now threatens to cause reduced revenues in the future from California plaintiffs' leases, which require higher payments to the lessors than do the scheduled Federal low-royalty leases.

FIRST CAUSE OF ACTION:

IN VIOLATION OF THE OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS, DEFENDANTS HAVE FAILED TO ISSUE REGULATIONS TO IMPLEMENT THE BIDDING SYSTEMS AUTHORIZED BY THE 1978 AMENDMENTS, AND PROPOSE TO CONTINUE TO USE INFERIOR BIDDING SYSTEMS THAT DO NOT ASSURE RECEIPT OF FAIR VALUE, ADEQUATE COMPETITION, OR EFFICIENT DEVELOPMENT.

133. The Outer Continental Shelf Lands Act, as amended in 1978, requires that

> "[l]easing activities shall be conducted to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government." Section 206, amending Section 18(a)(4).

134. Congress has authorized the Secretary to conduct lease sales pursuant to bidding systems other than the cash-bonus, low-royalty system or the cash-bonus, sliding-scale royalty system, in order to assure fair value, promote competition, and encourage efficient development of OCS resources. Section 205, amending Section 8(a)(1) of the Outer Continental Shelf Lands Act, gives the Secretary the authority to use seven specified bidding systems and to develop other one-variable bidding systems. Congress has made plain its intention that the Secretary is to use other bidding systems, Section 205, amending Section 8(a)(5)(B), and even requires the Secretary to report to it about the bidding systems planned for forthcoming lease sales and the reasons for use of particular bidding systems in past lease sales. Section 205, amending Sections 8(a)(8)(A) and (a)(9). The Secretary must select the bidding system for each sale that best satisfies the requirement of Section 18(a)(4) that "[l]easing activity shall be conducted to assure receipt of fair market value."

135. Although Congress has authorized alternative bidding systems, the Secretary has not fulfilled his duty to consider the full range of bidding systems for Lease Sale 48 and other scheduled lease sales. This default results from the decision to hold additional lease sales prior to the time that regulations governing the use of alternative bidding systems are in place. The Act specifies that competitive bidding for leases must be conducted "under regulations promulgated in advance," Section 205, amending Section 8(a)(1), and that regulations for the calculation of net profits must be developed at least ninety days prior to notice of any lease sale using a net profits bidding system. Section 205, amending Section 8(a)(6).

136. During the nine months since enactment of the 1978 amendments to the Outer Continental Shelf Lands Act on September 18, 1978, the Secretary of Energy has failed to promulgate any regulations pertaining to alternative bidding systems or to the calculation of net profits. See paragraph 123, *supra*. As a result, the Secretary of the Interior is disabled from using, or even considering, bidding systems set forth by Congress at Sections 8(a)(1)(D), (E), (F) and G) of the Act, as amended, including any system involving a sharing of net profits. At the present time, the Secretary is limited to use of less than one-half of the options made available by Congress in the Act. Moreover, there are no regulations to implement a meaningful competitive review, as required by the Act (see paragraph 123, *supra*), and such meaningful competitive review has not been taking place since enactment of the amendments. A recent Comptroller General Report shows that defendants themselves, by a continuing course of interdepartmental disagreements, have been responsible for the failure to implement necessary and important provisions of the Act. See paragraph 124, *supra*.

137. The Secretary, members of his Department, and members of the Department of Energy have repeatedly

emphasized that the sharing of net profits, unlike royalty systems with cash bonus bidding, increases competition and assures fair return without inhibiting the development of resources. See paragraphs 87, 99, 103-104, 127, *supra.* Those statements make clear that continued use of cash-bonus bidding systems, in disregard of net profit sharing or other, more effective systems, cannot be justified as a matter of policy or necessity.

138. As a result of the failure to promulgate regulations pertaining to alternative bidding systems, the Secretary is proposing to conduct Lease Sale 48 and other future lease sales pursuant to the cash-bonus, low-royalty bidding system and the cash-bonus, sliding-scale royalty bidding system, although neither system assures the receipt of fair market value or value equivalent to that obtainable under profit sharing systems. Competition for leases under both systems is inadequate to assure fair value because lessees must pay substantial cash bonuses and assume the risks of nondiscovery, development and exploration costs, and future markets. The high degree of risk prevents meaningful participation by small, independent companies and tends to depress bids. In addition, the Government cannot be assured of fair value because it lacks sufficient information about the value of the resources to assess accurately whether the highest bid for a tract should be accepted or rejected.

139. It is particularly inexcusable for defendants to continue to use a cash-bonus, 16⅔% royalty system when it has been demonstrated that payment of a sliding-scale royalty beginning at 16⅔% and increasing with production values to substantially higher royalties does not lessen the amount of the cash bonus. See paragraph 75, *supra.*

140. The Outer Continental Shelf Lands Act does not allow the Secretary to lease federal oil and gas resources on the Outer Continental Shelf without considering all authorized leasing options in order to meet the purposes and objectives of the Act. The Secretary will be able to

do so by rescheduling Lease Sale No. 48, and other scheduled lease sales, at a time when the Department of Energy has promulgated the necessary regulations and he has had sufficient time to give the regulations and the options thereunder full consideration.

141. The decision of the Secretary to hold Lease Sale No. 48 and other lease sales pursuant to cash-bonus, low-royalty bidding, before the Department of Energy has promulgated the necessary regulations governing alternative bidding systems, is inconsistent with his responsibilities as guardian of the public lands and violates his duties under the Outer Continental Shelf Lands Act.

142. The decision of the Secretary to hold Lease Sale 48 and other lease sales pursuant to cash-bonus, low-royalty bidding, before the Department of Energy has promulgated the necessary regulations governing alternative bidding systems, is arbitrary, capricious and a clear abuse of discretion.

143. Plaintiffs have no adequate remedy at law. Unless future lease sales are enjoined until necessary regulations are in place, the Secretary will give away the public's oil and gas resources to private lessees without adequate information, without effective competition, and without the assurance of fair return.

WHEREFORE, plaintiffs ask this Court to issue declaratory and injunctive relief prohibiting defendants from conducting Lease Sale 48 or any future lease sales until the Secretary of Energy has promulgated regulations governing use of all alternative bidding systems authorized in Section 8(a)(1) of the Outer Continental Shelf Lands Act, as amended, including systems allowing for the sharing of net profits, and the Secretary of the Interior has had an opportunity to consider, and has considered, use of those alternative systems for each scheduled lease sale.

SECOND CAUSE OF ACTION:

CASH-BONUS, LOW-ROYALTY BIDDING SYSTEMS, WHICH DO NOT ASSURE RECEIPT OF FAIR VALUE, DO NOT PROMOTE COMPETITION IN THE LEASE SALE MARKET OR IN THE PRODUCTION OF OIL, AND DO NOT ADEQUATELY ENCOURAGE DEVELOPMENT OF OUTER CONTINENTAL SHELF OIL AND GAS, ARE INCONSISTENT WITH THE OUTER CONTINENTAL SHELF LANDS ACT AND ARTICLE IV, SECTION 3, CL. 2 OF THE UNITED STATES CONSTITUTION.

144. Article IV, Section 3, Cl. 2 of the United States Constitution provides that "[t]he Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Pursuant to that provision, Congress holds public property as trustee for citizens of the United States. *United States* v. *California*, 332 U.S. 19. As trustee, Congress may not transfer public lands to private interests at less than fair value unless the transfer serves an overriding public need and the circumstances do not permit receipt of fair value. The Supreme Court has said "[Congress] would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize [public lands] for private gain . . . ." *Camfield* v. *United States*, 167 U.S. 518, 524 (1896).

145. Congress sought to fulfill its responsibilities as trustee of Federal lands on the Outer Continental Shelf by enacting the provisions of the 1953 Outer Continental Shelf Lands Act and the 1978 amendments. As discussed in paragraphs 18-29, *supra*, Congress in the 1953 Act gave the Secretary the authority to implement leasing systems that derived adequate information, promoted competition in the sale of leases, allowed a broad range of companies to participate in the production of oil, pro-

vided for effective exploitation of domestic resources, and assured receipt of fair value. In 1978, after the Secretary had been subjected to substantial criticism for his failures under the 1953 Act, Congress became disenchanted with previous conduct of the federal leasing program and amended the Act to make even clearer its insistence that the program be managed to assure fair market value, to promote competition, and to provide for efficient development of the resources. The Act imposes affirmative duties on the Secretary to achieve those objectives. See paragraphs 106-127, *supra.*

146. Despite the responsibilities imposed upon him by the 1978 amendments, the Secretary has continued to conduct, and is proposing to further conduct, offshore leasing by substantial reliance on a cash-bonus, low-royalty bidding system that not only has not promoted the objectives of the Outer Continental Shelf Lands Act, but has frustrated them. See paragraphs 30-105, *supra.* The cash-bonus system favored by the Secretary has limited competition predominantly to large, multinational companies, inhibited development of resources, and failed to provide or assure receipt of fair value. Its continued use effectively transfers public resources to a small number of large, multinational companies, contrary to the provisions and purposes of the Outer Continental Shelf Lands Act, and forces consumers either to buy back their own resources at inflated prices or to face serious shortages of necessary fuels.

Despite the documented failure of the cash-bonus, low-royalty system and despite evidence that alternative systems would allow the Secretary to meet his obligations under the Outer Continental Shelf Lands Act, see, *e.g.*, paragraphs 69-79, 87, 127, *supra*, the Secretary has consistently refused to discard cash-bonus bidding in favor of other authorized systems that would lessen the risks to lessees and thus increase competition and assure fair return.

147. The cash-bonus, low-royalty system not only has failed to meet the objectives of the Outer Continental Shelf Lands Act but necessarily will continue to violate the Act in the future. Given the meager information available at the time of sale, the heavy cash-bonus requirement prevents the competition necessary to achieve fair value.

148. The continued use of the cash-bonus, low-royalty bidding system, which has been shown incapable of providing adequate competition in the lease sale market, assuring fair value, encouraging development, and distributing oil and gas resources to a broad range of companies, is inconsistent with the responsibilities of Congress as trustee for the public lands and violates the Outer Continental Shelf Lands Act in the following respects:

a. It does not "preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the nation's energy needs as rapidly as possible, . . . (C) to ensure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition," as contemplated by Section 102 of the Act, as amended, nor does it "realize fair value, . . . preserve and maintain competition, and . . . reflect the public interest," as required by Section 101 of the Act, as amended.

b. It does not provide for adequate "competitive bidding," as required by Section 8(a)(1) of the Act, as amended.

c. It does not protect against concentration of the oil and gas resources in the hands of large integrated companies, as contemplated by Section 8(c)(1), Section 8(c)(2), Section 8(c)(3), and Section 15 of the Act, as amended.

d. It does not encourage "the prompt and efficient exploration and development of a lease area," as contemplated by Section 5(a)(7) of the Act, as amended.

e. It does not "assure receipt of fair market value for the lands leased and the rights conveyed the Federal Government," as required by Section 18(a)(4), as amended.

149. The continued use of the cash-bonus, low-royalty system is arbitrary and capricious, and a clear abuse of discretion.

150. The plaintiffs have no adequate remedy at law. Unless the use of cash-bonus, low-royalty bidding in future lease sales is enjoined, the Secretary will give the public's oil and gas resources to private lessees without adequate information, without the safeguard of effective competition, and without the assurance of fair value.

WHEREFORE, plaintiffs ask this Court to issue declaratory and injunctive relief against further use of the cash-bonus bidding system with a fixed royalty of 16⅔% and any other fixed low-royalty bidding system that fails to meet the requirements of the Outer Continental Shelf Lands Act, as amended.

THIRD CAUSE OF ACTION:

THE DEFAULT OF DEFENDANTS IN ASSURING THAT LEASES MET STATUTORY OBJECTIVES REQUIRES A COMPREHENSIVE INVESTIGATION BY DEFENDANTS TO FACILITATE APPROPRIATE CORRECTIVE ACTION.

151. Pursuant to Article IV, Section 3, Cl. 2 of the Constitution, Congress has a general fiduciary duty to obtain fair value for public resources transferred to private interests. See paragraph 144, *supra*. Congress codified that obligation in the Outer Continental Shelf Lands Act. See paragraph 145, *supra*.

152. In violation of the Constitution, the Outer Continental Shelf Lands Act, and his responsibilities as trustee, the Secretary since 1954 has carried on a leasing program that has denied and will continue to deny the public fair value for its offshore oil and gas resources.

The Secretary knew, or should have known, that continued use of the cash-bonus, low-royalty system was detrimental to the public interest and in excess of his authority under the Outer Continental Shelf Lands Act.

153. The Secretary knew or should have known that the beneficiaries of the cash-bonus, low-royalty federal leasing program—the lessees—formulated bids and accepted leases with awareness that the Secretary would continue to grant leases for less than fair value in violation of his responsibilities. Lessees have shown by their performance at other lease sales, see paragraphs 69-79, *supra*, that they can and will pay a greater share of production value when it is required of them by the Government.

154. The Secretary has hued to cash-bonus, low-royalty leasing as a result of his failure to investigate adequately and his acceptance of company claims as to their rates of return and the share received by the Federal Government, under cash-bonus, low-royalty leases. Industry representatives in 1975 assured Congress and the public that the Federal Government received as much as ninety-five percent of the value of production from the leases, although the percentage figure included all cash bonuses previously paid for leases while suppressing the value of future production from those leases. *See, e.g.*, Hearings on H.R. 6218 Before the House Ad Hoc Select Committee on Outer Continental Shelf, 94th Cong., 1st Sess. at 168, 170, 387, 466-467, 566, 1752-1753, 1758 (1975).

The Department of the Interior, in explaining use of the cash-bonus, low-royalty system, has perpetuated such misleading figures. For example, Secretaries of the Interior, in testimony before Congress, have agreed with oil company representatives that the Federal Government is receiving a very high share of production revenues from offshore leases although the figures used, like the figures urged by the companies, allowed fully for past bonuses but suppressed revenues from future production.

See, e.g., id. at 2639-2640; Joint Hearings on S. Res. 45 and S. Res. 222 Before the Senate Committees on Interior and Insular Affairs and Commerce, 94th Cong., 1st Sess. 41, 48 (1975). Furthermore, in developing estimates of company profits under leases, the Secretary has not insisted upon independent determinations of costs and taxes, but has relied almost exclusively on industry estimates. This approach has led to a significant understatement of return to the lessees. As a consequence, the Secretary has continued his dependence upon the cash-bonus, low-royalty system despite severe losses to the Federal Government.

155. Secretary has failed to investigate the bid practices of lessees and arrangements between lessees with respect to bids and future bidding, thus defaulting on his duty to be assured that OCS leases are surrendered for fair value under a competitive bidding system.

156. Defaults by the Secretary have permitted loss of public revenue. A recent study by the Comptroller General reveals that lessees, through errors and delays, have fallen millions of dollars in arrears on royalty payments under their leases, including offshore leases, and that there have been "serious deficiencies in the way the Geological Survey [of the Department of the Interior] maintained records of amounts due the Government under the terms of these leases." *Oil and Gas Royalty Collections—Serious Financial Management Problems Need Congressional Attention*, April 13, 1979, at i. The study showed that "[a]ll data used in the royalty collection system originated with the oil and gas industry" and that "[b]ecause the Geological Survey was not performing adequate numbers of lease account reconciliations and audits, it had to rely on unverified data from the oil and gas industry to compute and collect royalties due." *Ibid.* Yet the Report also indicated that "royalties due are normally understated by 7 to ten percent" (*id.* at 16), a figure that would mean an understatement of 60-90 million dollars in 1977. The uncollected money

was held by the industry without interest charge, and the Department of the Treasury was faced with a need to borrow to offset the shortfall. *Id.*, at ii.

157. The Secretary has also been derelict by failing to assure that lessees develop leased lands promptly. A very recent report by the Comptroller General, see paragraph 63d, *supra*, indicates a serious laxity by the Secretary in requiring due diligence in developing natural gas leases. The Report points out that "the Department of the Interior has no regulations to guide lessees in the exploration, development, and production of natural gas from Federal lands," *id.* at i, and "no standards for gauging whether lessees are exploring and developing their leases in a timely manner . . . ." *Id.* at iii. Adopting a "hands-off policy," *id.* at ii, the Department has allowed lessees "absolute discretion in directing the development and production decisions for the entire 5-year primary term" and, despite its broad authority to terminate leases at the end of five years, has "liberally regulated" development of leases even beyond their primary term. *Id.* at 7.

The Department has persisted in this administrative mismanagement in the face of repeated requests for change. As the Report notes:

> "With the continued threat of gas supply shortages in the forefront, various parties, including State regulatory commissioners, Congressmen, and members of the public, since 1970, have called for a policy addressing diligence in exploration, development, and production of OCS leases. Interior has responded primarily by gathering more information on the status of its leases and on explaining its practices to the Congress and the public. Despite an obvious need, a policy to help alleviate the shortages has not been developed."

158. These defaults by the Secretary are not unique in the administration of the offshore leasing program.

The Secretary historically has done little to police bidding arrangements or to assure the receipt of complete and accurate information from the oil companies.

159. The Secretary has failed to protect the public by acquiring accurate information and by forcing lessees to satisfy the objectives of the Outer Continental Shelf Lands Act.

WHEREFORE, plaintiffs ask this Court to issue an order directing defendants:

To review in detail every lease obtained pursuant to cash-bonus, low-royalty bidding to determine whether the issuance or continuance of each lease was consistent with the requirements of the Outer Continental Shelf Lands Act and all other legal requirements; and to take appropriate corrective action in any instance where the Secretary determines that issuance or continuance of any lease was not consistent with all legal requirements.

On account of the foregoing allegations, plaintiffs ask for the relief specified in each of their causes of action, for the award of costs and reasonable attorneys' fees, and for such other relief as may be necessary or appropriate.

/s/ Joseph L. Rauh, Jr.
JOSEPH L. RAUH, JR.
JOHN SILARD
JUDY L. WOLF
RAUH SILARD & LITCHMAN
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

/s/ H. Bartow Farr, III
H. BARTOW FARR, III
JONATHAN D. SCHILLER
ROGOVIN STERN & HUGE
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.

ENERGY ACTION, ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary of the Interior, ET AL.,
DEFENDANTS

AFFIDAVIT OF EDWIN ROTHSCHILD

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

The affiant, EDWIN ROTHSCHILD, having been duly sworn, states as follows:

1. I am a resident of McLean, Virginia. I am presently the Research Director of the Energy Action Educational Foundation. I have held the position of Research Director since October, 1977.

2. As Research Director, I have participated in Energy Action's preparation and submission of comments to the Department of the Interior on numerous Outer Continental Shelf lease sales from 1977 to the present. In addition, I have appeared personally from time to time at hearings conducted by the Department of the Interior concerning offshore natural gas and oil lease sales, leases and related matters.

3. I have read the Complaint in the above-captioned case and, on information and belief, verify as true and correct the factual allegations set forth therein.

DATED this 20th day of June, 1979.

/s/ Edwin Rothschild
EDWIN ROTHSCHILD

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

Subscribed, sworn to and acknowledged before me, a Notary Public in and for the State and City aforesaid, by Edwin Rothschild, on this 20th day of June, 1979.

[SEAL]

/s/ Beth L. Fowler
Notary Public
My Commission Expires
February 14, 1984

APPENDIX A

CONSUMER ENERGY COUNCIL OF AMERICA MEMBER ORGANIZATIONS

Adams Electric Cooperative, Inc.
AFL-CIO
Allegheny Electric Cooperative, Inc.
Amalgamated Clothing & Textile Workers Union, AFL-CIO
American Federation of State County & Municipal Employees, AFL-CIO
American Federation of Teachers, AFL-CIO
American Public Gas Association
American Public Power Association
Association of Illinois Electric Cooperatives
Association of Texas Electric Cooperatives, Inc.
Basin Electric Power Cooperative
Central Power Electric Cooperative, Inc.
Citizen/Labor Energy Coalition
Consumer Federation of America
Cooperative League of the USA
East River Electric Power Cooperative, Inc.
Florida Electric Cooperatives Association
Hoosier Energy Division, Indiana Statewide Rural Electric Cooperative
Industrial Union Department, AFL-CIO
International Association of Machinists and Aerospace Workers, AFL-CIO
International Molders and Allied Workers Union, AFL-CIO
Kansas Electric Cooperatives, Inc.
Kansas Municipal Utilities
Lincoln (Nebraska) Electric System
Marine Engineers Beneficial Association
Maritime Trades Department, AFL-CIO
Minnesota Farmers Union
National Council of Senior Citizens
National Farmers Organization

National Farmers Union
National Rural Electric Cooperative Association
North Carolina Electric Membership Corporation
North Dakota Farmers Union
Northeast Missouri Electric Power Cooperative
Northeast Public Power Association
Northwest Iowa Power Cooperative
Northwest Public Power Association
Oil, Chemical and Atomic Workers International Union, AFL-CIO
Pennsylvania Rural Electric Association
Rocky Mountain Farmers Union
Service Employees International Union, AFL-CIO
South Dakota Farmers Union
South Texas Electric Cooperative, Inc.
Southside Electric Cooperative Inc.
Tennessee Valley Public Power Association
Texas AFL-CIO
Tillamook Peoples Utility District
United Auto Workers
United States Conference of Mayors
United Steelworkers of America, AFL-CIO
Valley Electric Cooperative
Washington Public Utility Districts' Association
Wisconsin State AFL-CIO

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CITIZEN/LABOR ENERGY COALITION

NATIONAL OFFICERS

William W. Winpisinger, President
International Association of Machinists

William Hutton, Secretary-Treasurer
National Council of Senior Citizens

EXECUTIVE COMMITTEE

Mike Ansara
Massachusetts Fair Share

Ira Arlook
Ohio Public Interest Campaign

Ellen Berman
Consumer Energy Council of America

Roger Blobaum
Rural America

Ed Carlough
Sheet Metal Workers' International Association

Bob Creamer
Illinois Public Action Council

Louise Dunlop
Environmental Policy Center

Joe [illegible]
Care Action

[illegible]
Action

Douglas Fraser
United Automobile Workers

Lark Green
Public Citizen

Al Grospitron
Oil, Chemical, and Atomic Workers International Union

Tom Hayden
Campaign for Economic Democracy

Lynette Lewis
Operation PUSH

Lloyd McBride
United Steelworkers of America

John Ryor
National Education Association

Tim Sampson
Citizens Action League

Jacob Sheinkman
Amalgamated Clothing and Textile Workers Union

Pat Sweeney
Northern Plains Resource Council

Bernard Veney
National Clients Council

Fritz Wiecking
Citizens Action Coalition of Indiana

Jerry Wurf
American Federation of State, County, and Municipal Employees

William Wynn
Retail Clerks International Union

Eugene Zappo
N.J. Federation of Senior Citizens

NATIONAL OFFICE

Heather Booth, Executive Director
Ken Rolling, Administrative Director
Steve Max, Field Director
Citizen/Labor Energy Coalition
600 West Fullerton
Chicago, Illinois 60614
Phone: 312/929-9126

WASHINGTON OFFICE

[illegible]

REGIONAL ORGANIZERS

NORTHEAST
Mark Dyen
Citizen/Labor Energy Coalition
304 Boylston St., 2nd Floor
Boston, MA 02116
(617) 266-7505
Vermont, New Hampshire, Massachusetts, Connecticut, Rhode Island, and Maine

MIDWEST
Bob Hudek
Citizen/Labor Energy Coalition
600 West Fullerton
Chicago, IL 60614
(312) 929-9125
Illinois, Indiana, Michigan, Wisconsin, Ohio, Nebraska, Iowa, Kansas, Missouri, and Minnesota

SOUTH
Ken Dupre
850 South Fourth St.
Louisville, KY 40203
(502) 585-4076
Kentucky, Tennessee, Georgia, Florida, South Carolina, North Carolina, Alabama, Mississippi, West Virginia, and Virginia

NORTHWEST
Kari Englund
329 South Fourth, West
Missoula, MT 59801
(406) 728-6387
Washington, Oregon, Idaho, and Montana

MID-ATLANTIC
Eileen Kirlin
c/o Retail Clerks Local 1357
210 East Courtland
Philadelphia, PA 19120
(215) 457-5200, Ext. 235
New York, Pennsylvania, New Jersey, Delaware, and Maryland

MEMBER ORGANIZATIONS

(Partial Listing)

A. Philip Randolph Institute, Kansas City

Action Alliance of Senior Citizens in Greater Philadelphia

Alaska Public Interest Research Group

Aluminum Workers International Union

Amalgamated Retirees Club, Local 657

Americans for Democratic Action

Appalachian Research and Defense Fund
of A W R New York

Catholic Committee on Urban Ministry

Citizens Alliance, New York

Citizens Coalition for Tax Reform, Delaware

Coalition of Black Trade Unionists

Coalition of Labor Union Women

Coalition on Legislation for the Elderly

Commission on Racial Justice, United Church of Christ

Community Action Research Group, Iowa
[illegible]

Connecticut Citizens Action Group
Consumers Cure, Florida
Democratic Socialist Organizing Committee
Environmental Action
Environmental Action Foundation
Environmental Information Center, Montana
Environmentalists for Full Employment
Federation of Church Social Agencies, Kentucky
Florida Consumers Federation
Florida Justice and Peace Center
Georgia Action
Granite State Alliance, New Hampshire
Gray Panthers, Kansas City, Missouri
Greater Kansas City Citizen/Labor Energy Coalition
Idaho Citizens Coalition
Institute for Southern Studies
International Chemical Workers
International Longshoremens and Warehousemens Union
International Longshoremens Association
Iowa Citizen/Labor Energy Coalition
Jefferson County Council on Aging, Kentucky
Justice and Peace Center, Milwaukee, Wisconsin
Kanawha Valley Labor Council, West Virginia
Kentucky AFL-CIO
Kentucky Association for Older Persons
Kentucky Clients Council
Life of Land, Hawaii
Light Brigade, Seattle, Washington
Louisville Tenants Union
Maine Citizens for Utility Rate Reform
Maine Citizen/Labor Energy Coalition
Maine Public Interest Research Group
Massachusetts Citizen/Labor Energy Coalition
Massachusetts Public Interest Research Group
Michigan Citizen/Labor Energy Coalition
Michigan Citizens Lobby
Michigan Coalition on Utilities and Energy
Minnesota Citizens Action
Minnesota Senior Federation
Montana Senior Citizens Association
[illegible]

National Football League Players Association
Neighborhood Community Development Center, Kansas City, Mo
New American Movement
New Hampshire Citizen Labor/Energy Coalition
New Jersey Industrial Union Council, AFL-CIO
New York Peoples Power Coalition
New York Public Interest Research Group
New York Statewide Senior Action Council
North Carolina, AFL-CIO
Northern California Coalition for Full Employment
Northern Rockies Action Group
Ohio State Council of Senior Citizens
Ohioans for Utility Reform
Oregon Fair Share
Oregon Solar Lobby
Peace and Justice Center, Louisville, Kentucky
Peace and Justice Commission, North Carolina
Pennsylvania Alliance
Pennsylvania Alliance for Jobs and Energy
Pennsylvania Social Services Union, SEIU, Local 668
Peoples Alliance
Rhode Island Coalition for Consumer Justice
Seattle Ratepayers Coalition
South Carolina Public Interest Research Group
Southern Christian Leadership Conference
Southern Organizing Committee
Southerners for Economic Justice
Southwest Resource and Information Center
St. Louis Citizen/Labor Energy Coalition
Tennessee Valley Clean Energy Alliance
Tennessee Valley Consumer Coalition
United Presbyterian Church in U S A
Urban Environment Conference
Urban League of Louisville, Kentucky
Urban League of Philadelphia
Utility Consumers United Milwaukee, Wis
West Virginia AFL-CIO
[illegible]

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APPENDIX B

ENERGY ACTION

Educational Foundation, 1523 L Street, NW, Suite 302,
Washington, DC, 20005 (202) 737-6220

October 26, 1978

The Honorable Cecil D. Andrus
Secretary of the Interior
18th and C Streets, N.W.
Washington, D.C. 20240

Dear Mr. Secretary:

On September 29, 1978, the Department of the Interior announced that Sale #65 in the Eastern Gulf of Mexico would be the first sale held under the new Outer Continental Shelf Lands Act Amendments signed into law by President Carter on September 18, 1978. One of the findings of this new law declares that "the Outer Continental Shelf contains significant quantities of oil and natural gas and is a vital national resource reserve which must be carefully managed so as to realize fair value, to preserve and maintain competition, and to reflect the public interest."

Similarly, two important purposes of the Act are to "insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and . . . preserve and maintain free enterprise competition." To achieve these purposes, Congress requires the Secretary to use bidding systems other than the fixed royalty cash bonus system for a minimum of 20% and a maximum of 60% on all areas offered for lease each year. This reflected a congressional intention for a substantial shift away from the old systems to new systems. As stated in the Senate Energy and Natural Resources Committee's Report, (June 21, 1977), "The basic thrust of all these new options is to reduce the reliance on large front-end cash bonuses as the means of obtaining a fair price for the public's property."

Moreover, in providing reasons (as required by the new Act) as to why the sliding scale royalty system was

chosen for 22 tracts, in Sale #65, the Department itself stated, "This is intended to reduce bonuses, which should improve competition for leases" (Federal Register, Vol. 43, No. 190, September 29, 1978, p. 44896)—clear recognition that the fixed royalty cash-bonus bidding system has frustrated competition.

Yet, in Sale #65 only about 25% of the tracts will be offered on the basis of a cash bonus bid with a sliding scale royalty. The remaining 75% of the tracts will be leased on the basis of the cash bonus fixed royalty system, a system which has been shown to restrict competition and deprive the public of fair market value. Even prior to the passage of the OCS Lands Act Amendments of 1978, in Sale #CI and Sale #43, the Department offered one-third of the tracts under an alternative to the fixed royalty cash bonus system. Thus, instead of increasing the portion of tracts to be offered on the basis of alternative systems, the Department has reduced the percentage! This is not only an attempt to frustrate the intention of Congress, but also an open admission by the Department that it is unwilling to take available steps to maximize competition and obtain fair value for the public's OCS resources.

We hereby adopt by reference with request to sale #65 our previous correspondence to you (our letters of January 23, March 24, March 30, April 12, April 20, and May 9, 1978) relating to previous sales, and hereby formally notify you that for the reasons stated in the above mentioned letters, and in light of the failure to correct the serious legal flaws, information gaps, procedural failures and violations of trustee responsibility, we consider any leases let under this system to be presumptively illegal, beyond the power of the Department to confer, and potentially the product or result of reckless nonfeasance by the Department's officials and/or a continuing conspiracy by the oil industry and others to deprive the federal government of valuable public resources without adequate compensation. In addition the new law adds to or makes explicit responsibilities that we believe

existed under prior laws, and thus provides additional grounds for concluding that the Department is not fulfilling its legal responsibilities.

For example, in previous correspondence we have pointed out that the Department of Energy Organization Act requires the Secretary of Energy "to prescribe regulations" which relate to "fostering of competition for Federal leases" and other provisions. Such regulations have never been promulgated and constitute a preexisting legal flaw in past leases. Now the OCS Lands Act Amendments explicitly require (Section 205(c)(1)) a competitive review by the Department of Justice and the Federal Trade Commission, yet in the absence of DOE regulations, there are no standards or procedures for this vital review process, thus voiding both the review process and the leases to which it applies.

We urge you therefore to postpone Sale #65 scheduled for October 31, 1978 in New Orleans, Louisiana until the leasing arrangements can be brought into full compliance with your legal and fiduciary responsibilities. Failing this we request you forthwith to notify all qualified bidders for that sale, either directly or through an immediate Federal Register notice, that this claim of presumptive invalidity of the proposed leases has been made, and may operate to vitiate some or all of purported leasing agreements if the Department or a court ultimately sustains some or all of the bases for the claim. Although we believe that Section 23 of P.L. 95-372 has no application to our claims of illegality either under previous law or P.L. 95-372, to the extent § 23 may be construed to be applicable to us or others making similar claims, this letter should be deemed to be a notice on our behalf and on behalf of those who may assert similar positions for the purposes of § 23.

Sincerely,

/s/ James F. Flug
JAMES F. FLUG
Director and Counsel

cc: Robert Kalter, Director Leasing Programs, Department of Energy
Barbara Heller, Deputy Under Secretary

I hereby affirm under oath that the facts and conclusions stated herein are true to the best of my knowledge and belief.

/s/ James F. Flug
JAMES F. FLUG

/s/ Linda A. Dryden
LINDA A. DRYDEN

My Commission Expires
May 14, 1981

ENERGY ACTION
Educational Foundation, 1523 L Street, N.W., Suite 302
Washington, DC, 20005 (202) 737-6220

December 13, 1978

The Honorable Cecil D. Andrus
Secretary of the Interior
18th and C Streets, N.W.
Washington, D.C. 20240

Dear Mr. Secretary:

On November 13, 1978 the Department of the Interior announced that Sale #51 in the Western and Central Gulf of Mexico was to be the second sale held under the new Outer Continental Shelf Lands Act Amendments. The first sale to be conducted under the new Act, Sale #65, demonstrated that even under new authority, the Department has continued to rely on outmoded, ineffective methods which do not assure adequate competition and the receipt of fair market value as explicitly required by the OCS Lands Act Amendments. This conclusion is obvious from an analysis of Sale #65.

The Department in Sale #65 offered 89 tracts estimated to contain "between 15 and 150 million barrels of oil and 20-175 billion cubic feet of natural gas" (FEIS, p. I-1, Vol. 1). Yet, except for two tracts, all of the tracts bid on were evaluated by the U.S. Geological Survey to contain little or no oil or gas resources. 33 of the 35 tracts bid on by the companies were evaluated by the Survey at the minimum value ($25/acre or $144,000 per standard 5,760 acre tract). In addition, the information used by the Survey to make its estimates was of very low reliability. Indeed, the industry had as much confidence in the value of the tracts put up for bid as did the Department. This is clear from an analysis of the bidding patterns. Of the 89 tracts offered, 54 received no bids, 20 received 1 bid, nine received 2 bids,

three received 3 bids, one received 4 bids, one received 5 bids and one received 6 bids. Thus, the average number of bids for all tracts offered was 0.7 bids per tract and the average for all tracts bid on was 1.8 bids per tract.

This sale also witnessed the continuing presence of joint venture arrangements led by major companies (Mobil/Amerada Hess; Shell, Cities Service and Sun; Chevron/Southern Natural, etc.). Because of these joint venture arrangements, eight potential bidders were eliminated, so that instead of 15 bidders there were actually only seven. It is also important to note that the major-led joint ventures tended to avoid bidding on the sliding-scale royalty tracts and concentrated most of their effort on the low fixed royalty high bonus bid tracts. In addition to the small number of bidders (lack of competition for OCS tracts) and other potential competitive problems (impact of granting of leases on competition in relevant markets), the lack of knowledge of the potential resources in the lease area (as evidenced by the large number of minimum evaluations and the fact that the average bid exceeded the average evaluation by nearly 950%) can only result in the public's not receiving fair market value for its resources as well as in the misdirection of industry capital.

In a News Release dated November 16, 1978, the Department announced acceptance of all the bids, but there was no mention that the Secretary had made a determination with regard to the competitive review mandated by the OCS Lands Act Amendments (Sec. 205(b)(3)). Although the Department of Justice did not conduct a competitive review (see letter dated October 24, 1978) and even though the Justice Department did not consult with the Federal Trade Commission, a determination by the Secretary must still be made.

Since Sale #51 is being conducted in the same general area in which Sale #47 was conducted in June 1977, it is important to understand some of the results that have already been reported from the drilling of

tracts from that sale. In an *Oil and Gas Journal* article entitled, "Success Ratio High on June '77 Leases in Gulf," (10/30/78), it was reported that:

> Operators haven't encountered any surprises. They generally have either found what their sophisticated exploration programs indicated was there in deeper waters or they have drilled discoveries in highly developed shallow-water areas.

Indeed, on the 29 tracts listed by the *Journal* the total amount bid was a little more than $501 million versus a U.S.G.S. evaluation of just over $60 million, 8½ times what was bid. Thus, even in an area where the greatest amount of information exists, the U.S.G.S. has been incapable of assuring the public fair market value in its pre-lease evaluations.

We hereby adopt by reference with respect to Sale #65 our previous correspondence to you (our letters of October 28 & 31, 1977, December 9, 1977, January 23, March 24, March 30, April 12, April 20, May 9, and October 26, 1978) relating to previous sales, and hereby formally notify you that for the reasons stated in the above-mentioned letters, and in light of the failure to correct the serious legal flaws, information gaps, procedural failures and violations of trustee responsibility, we consider any leases let under this system to be presumptively illegal, beyond the power of the Department to confer, and potentially the product or result of reckless nonfeasance by the Department's officials and/or a continuing conspiracy by the oil industry and others to deprive the federal government of valuable public resources without adequate compensation. In addition the new law adds to or makes explicit responsibilities that we believe existed under prior laws, and thus provides additional grounds for concluding that the Department is not fulfilling its legal responsibilities.

For example, in previous correspondence we have pointed out that the Department of Energy Organization Act requires the Secretary of Energy "to prescribe regu-

lations" which relate to "fostering of competition for Federal leases" and other provisions. Such regulations have never been promulgated and constitute a preexisting flaw in past leases. Now the OCS Lands Act Amendments explicitly require (Section 205(c)(1)) a competitive review by the Department of Justice and the Federal Trade Commission, yet in the absence of DOE regulations, there are no standards or procedures for this vital review process, thus voiding both the review process and the leases to which it applies.

We urge you therefore to postpone Sale #51 scheduled for December 19, 1978 in New Orleans, Louisiana until the leasing arrangements can be brought into full compliance with your legal and fiduciary responsibilities. Failing this we request you forthwith to notify all qualified bidders for that sale, either directly or through an immediate Federal Register notice, that this claim of presumptive invalidity of the proposed leases has been made, and may operate to vitiate some or all of purported leasing arrangements if the Department or a court ultimately sustains some or all of the bases for the claim. Although we believe that Section 23 of P.L. 95-372 has no application to our claims of illegality either under previous law or P.L. 95-372, to the extent that Section 23 may be construed to be applicable to us or others making similar claims, this letter should be deemed to be a notice on our behalf and on behalf of those who may assert similar positions for the purposes of Section 23.

Sincerely,

/s/ Edwin Rothschild
EDWIN ROTHSCHILD
Research Director

cc: Robert Kalter, Director, Leasing Programs,
Department of Energy
Barbara Heller, Deputy Under Secretary,
Department of the Interior

I hereby affirm under oath that the facts and conclusions stated herein are true to the best of my knowledge and belief.

/s/ Edwin Rothschild
EDWIN ROTHSCHILD
Research Director

/s/ Linda A. Dryden
LINDA A. DRYDEN
My Commission Expires
May 14, 1981

ENERGY ACTION

Educational Foundation, 1523 L Street, NW, Suite 302,
Washington, D.C. 20005 (202) 737-6220

December 29, 1978

The Honorable Cecil D. Andrus
Secretary of the Interior
18th and C Streets, N.W.
Washington, D.C. 20240

Dear Mr. Secretary:

In February 1979, the Department of the Interior intends to hold Sale #49 in the Mid-Atlantic region. Included in this proposed sale are tracts which are adjacent to tracts leased in Sale #40 as well as tracts which are to the northeast and southwest of the tracts leased in Sale #40. When you first announced the present five-year leasing plan, you stated:

> There is an approximate three-year interval between the first sales in a frontier area and subsequent sales in the same geologic province.

and that

> . . . this interval would provide for an orderly level of activity for both exploration and development and permit the use of exploratory results from one sale in making tract selections for a later sale. (News Release, 8/23/77)

Because acceptance of the bids was delayed by legal action, drilling in the leased area did not begin until March 29, 1978. Thus, by the time of Sale #49, less than a year will have elapsed between the beginning of drilling and the date of the proposed sale. Clearly, this amount of time is not sufficient for the collection of adequate data on which to base evaluations for Sale #49.

On November 8, 1978, you announced your intention to allow oil companies "to drill pre-lease test wells on

the Outer Continental Shelf directly on geologic structures that could contain oil or natural gas." At that time it was announced by Dr. G. William Menard, Director of the U.S. Geological Survey, that "proposed revisions to existing regulations will be published in the *Federal Register*, with adequate time for public review and comment." As of today there has been no such notice published in the *Federal Register*. Therefore, since many of the proposed tracts for Sale #49 are in areas where there has been no pre-lease exploratory drilling, and since with additional time on-structure stratigraphic wells could be drilled, the Department has sufficient reason to wait until the regulations are in place and such wells are permitted before tracts are leased.

It is also our view that there exists a conspiracy by the oil companies to defraud the government and restrain competition in their bidding for OCS leases. The companies have stated repeatedly that the Government, not the industry, collects the lion's share of revenue from the production of oil and gas from the OCS when in fact the opposite is true. Secondly, various joint venture agreements and agreements between potential joint bidders tend to restrict potential competitors from bidding in certain OCS regions. This conspiracy results in a diminution of competition for OCS tracts which in turn deprives the public of fair market value for its resources.

We hereby adopt by reference with respect to sale #49 our previous correspondence to you (our letters of January 23, March 24, March 30, April 12, April 20, and May 9, October 26, December 13, 1978) relating to previous sales, and our testimony at the Department's E.I.S. hearing on Sale #49 at Atlantic City on June 28, 1978, and hereby formally notify you that for the reason above, for the reasons stated in the above-mentioned letters and testimony, and in light of the failure to correct the serious legal flaws, information gaps, procedural failures and violations of trustee responsibility, we consider any leases let under this system to be presump-

tively illegal, beyond the power of the Department to confer, and potentially the product or result of reckless nonfeasance by the Department's officials and/or a continuing conspiracy by the oil industry and others to deprive the federal government of valuable public resources without adequate compensation.

We urge you therefore to postpone Sale #49 until the leasing arrangements can be brought into full compliance with your legal and fiduciary responsibilities including but not limited to completion of the initial drilling program on the Sale #40 leases and issuance and implementation of the on-structure drilling regulations. Failing this we request you forthwith to notify all qualified bidders for that sale, either directly or through an immediate Federal Register notice, that this claim of invalidity of the proposed leases has been made, and may operate to vitiate some or all of purported leasing agreements if the Department or a court ultimately sustains some or all of the bases for the claim. Although we believe that Section 23 of P.L. 95-372, to the extent § 23 may be construed to be applicable to us or others making similar claims, this letter should be deemed to be a notice, for the purposes of § 23, on our behalf and on behalf of those who may assert similar positions with respect to Sale #49 or future sales.

Sincerely,

/s/ James F. Flug
JAMES F. FLUG
Director & Counsel

/s/ Edwin Rothschild
EDWIN ROTHSCHILD
Research Director

We hereby affirm under oath that the facts and conclusions stated herein are true to the best of our knowledge and belief.

/s/ James F. Flug
JAMES F. FLUG

/s/ Edwin Rothschild
EDWIN ROTHSCHILD

District of Columbia: ss

I, Barbara H. Holden, Notary Public in and for the District of Columbia, do hereby certify that James F. Flug and Edwin Rothschild both appeared before me personally and signed the above letter this 29th day of December, 1978.

[SEAL]

/s/ Barbara H. Holden
Notary Public
My Commission Expires
January 31, 1980

APPENDIX C

STATE LANDS COMMISSION

[SEAL]

May 4, 1979

The Honorable Cecil D. Andrus
Secretary of the Interior
U. S. Department of the Interior
Washington, D.C. 20240

Dear Secretary Andrus:

Pursuant to Section 23 of the Outer Continental Shelf (OCS) Lands Act, as amended, (the Act) I hereby notify you, in writing under oath, on behalf of the California State Lands Commission, of our belief that various provisions of the Act are being and will be violated in the proposed Lease Sale 48 currently scheduled to be held in June 1979. These violations jeopardize the validity of proposed Lease Sale 48.

Section 18(a)(4) of the Act states that:

> "(4) Leasing activities shall be conducted to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government." (See also Section 102(2)(c)).

Yet, it is our understanding that the bidding on Lease Sale 48 will largely be conducted on a cash-bonus low-royalty basis. That system, contrary to the terms and policies of the OCS Act, confers rights to federal oil and gas at less than fair value, inhibits competition in the sale of leases and in the production of oil and gas, (see Section 102(2)(d)), encourages the hoarding rather than the full exploitation of oil and gas resources, (see Section 102(1), (2)(a)), and, without greater information about the prospects for recovery, is inconsistent with

responsible management of the nation's public resources. (See Section 3(3)).

It is our belief that, to provide a full opportunity to obtain fair value and to meet the other requirements of the Act, the Secretary must have available to him for his consideration and use, all of those forms of competitive bidding specified in Section 8(a)(1)(A)-(G) of the Act. Indeed, Section 8(a)(1) requires that bidding be conducted "under regulations promulgated in advance", and Section 8(a)(6) of the Act requires that rules for bidding systems involving the calculation of net profits be established at least ninety days before the notice of any lease sale using those systems.

To our knowledge and belief, no regulations have been established pursuant to Section 8(a)(6) of the Act. As a result of this fact and the proposed timing of Lease Sale 48 (June 1979), the Secretary is precluded from the consideration and use of the systems specified in subparagraphs (D), (E), or (F), which under prudent administration would assure the receipt of fair market value, and perhaps other subparagraphs as well. To conduct a lease sale pursuant to cash-bonus low-royalty bidding, without any opportunity to consider other bidding systems that may satisfy or better serve the requirements of the Act, is a serious abuse of discretion and a violation of the Act.

Secondly, the Secretary has not fully complied with the provisions of Section 8(g) of the Act with respect to either of Lease Sales 48 and 53 scheduled for the California OCS. To our knowledge and belief, the Governor of the State of California has not received the material specified in Section 8(g)(1)(B), (C), and (D), nor was he given the opportunities specified in the first portion of Section 8(g)(2), even though the law became effective in September 1978. Further, while the Secretary did provide, via letter dated March 30, 1979, an offer to enter an agreement pursuant to Section 8(g)(2), the validity of that offer must be questioned because

the Secretary has not complied with the conditions precedent as previously specified. Even if that were not the case, the timing of the communication was such that the Governor is not afforded a full ninety days, as authorized by Section 8(g)(3), to respond and is allowed no time for negotiation of terms prior to the scheduled Lease Sale 48 (June 1979). While the Governor may be able to respond within the sixty days requested by the Secretary as to whether an agreement in concept is possible, he is restricted in his ability to negotiate by the lack of information, which should have been furnished pursuant to Section 8(g)(1)(B). One of the major reasons for the provision of such information is to enable the State to make an independent evaluation regarding the location and extent of common pools and to enter into an agreement(s) under this Section with knowledge equal to that of the Federal Government.

Furthermore, if the State and the Secretary cannot enter into a unitization agreement, the provisions of 8(g)(3) and (4) might appear to allow the Federal Government to drain and sell State oil and gas pursuant to the terms of a federal lease. There is more than a substantial risk that under the lease terms which can be available for this sale, the State will thus be denied fair value for its oil and gas.

Finally, Section 5(b) requires that:

> "(b) The issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of this Act shall be conditioned upon compliance with regulations issued under this Act."

It is our belief that inherent in this Section is the requirement that such regulations be in effect at the time of any lease issued subsequent to the amendments to the Act. Notable among the regulations specified in Section 5(a)(1)-(8), which have yet to be issued in final form, are those "for compliance with the national

ambient air quality standards pursuant to the Clean Air Act". Based on our interpretation of Section 5(b), the Secretary would be in violation of the provisions of the Act if any leases, specifically those which would result from Lease Sale 48, were issued prior to the issuance of regulations, as enumerated above, in their final form.

It is our belief that, speculating that such is not the case, industry will be loath to risk too much capital in the acquisition of leases which are burdened with as yet to be determined regulations, particularly with regard to air quality and the specter of trade-offs, which would diminish the nature and extent of their economic return. Such a "cloud" over the leases to be issued would thus inhibit the Secretary's charge "to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government". This, in our opinion, would constitute a further violation of the provisions of Section 18(a)(4) of the Act.

The objections which we have made in this letter are not intended to be exclusive and we specifically reserve the right to make amendments as necessary.

Sincerely,

/s/ James F. Trout
JAMES F. TROUT
Assistant Executive Officer

STATE OF CALIFORNIA)
)
COUNTY OF SACRAMENTO)

On this 4th day of May, 1979, before me, Diane R. Jones, Notary Public, State of California, duly commissioned and sworn, personally appeared Mr. James F. Trout, Assistant Executive Officer of the State Lands Commission, known to me to be the person whose name is subscribed to the attached document, and acknowledged to me that he executed the attached document and under duly administered oath did furthermore swear to the truth of his statements in the attached document.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County of Sacramento.

/s/ Diane R. Jones
Notary Public
In and for the
State of California

[SEAL]

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE LANDS COMMISSION OF CALIFORNIA;
ENERGY ACTION;
THE CITY OF LONG BEACH, CALIFORNIA; ET AL.

v.

UNITED STATES, ET AL.

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

AFFIDAVIT OF GEORGE L. DONKIN

The affiant, GEORGE L. DONKIN, having been duly sworn, states as follows:

My name is George L. Donkin. I am Vice President and Director of Petroleum Studies of J.W. Wilson & Associates, Inc. J.W. Wilson & Associates, Inc. is an economic consulting firm specializing in energy economics, public utility regulation, antitrust analysis and economic research. A summary of my professional experience and qualifications is attached as Exhibit 1 to this Affidavit.

A large portion of the United States' undiscovered crude oil and natural gas resource base is in the offshore areas of the Outer Continental Shelf (OCS). For example, the U.S. Geological Survey estimates that 37.1 percent of our undiscovered recoverable oil resources and 22.1 percent of our undiscovered recoverable natural gas resources will ultimately be found and produced from offshore areas of Alaska, the Gulf of Mexico and the Pacific and Atlantic Coastal States.*

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* *Geological Estimates of Undiscovered Recoverable Oil and Gas Resources in the United States*, Geological Survey Circular 725, 1975.

Since 1954, leasing of federal OCS oil and gas properties has been conducted by the Department of the Interior. Until recently, all OCS oil and gas leases were sold pursuant to fixed, one-sixth royalty provisions with each lease being awarded to the bidder submitting the highest acceptable bonus payment at the time of the lease sale.

During the period 1954-1970, OCS leasing and production activity was concentrated primarily in the Gulf of Mexico, which today represents one of the Nation's most prolific oil and natural gas producing basins. During the 1970's however, federal leasing activity accelerated and offshore areas in Alaska and Atlantic Coastal regions have been opened up to exploratory drilling in the search for oil and gas.

It was also during this post 1970 period that wellhead prices for crude oil and natural gas rose dramatically above historical levels. For example, in 1970 the average production value of OCS crude oil was $3.30 per barrel and the average price for OCS natural gas was 18.1 cents per thousand cubic feet (Mcf). By 1977, crude oil prices for OCS leases sold in 1973 had risen to $11.49 per barrel and the average gas price for 1973 leases was $1.42 per Mcf. Moreover, as a result of the Natural Gas Policy Act of 1978 and recent events in world crude oil markets, the real wellhead value of OCS oil and gas production will continue to escalate rapidly through the 1990's and into the next century.

Because substantial production has already taken place from Gulf of Mexico OCS leases sold during the period 1954-1970, it is possible to analyze the effective government share, in the form of royalty payments and lease bonuses, of the total production value for that group of leases. However, is should be recognized that a large portion of the oil and gas produced from 1954-1970 leases took place at historical price levels which were well below the prices which will be received for future production

from both 1954-1970 leases and leases sold subsequent to 1970.

The effective government share of the value of OCS oil and gas production is the percentage derived from combining up-front bonuses received at the time of the lease sale with subsequent government royalty receipts and then dividing that amount by the total value of all oil and gas produced from the relevant group of leases. In essence, this computation results in an effective "adjusted" royalty payment to the government. This calculation should take into account two significant economic factors—inflation and the time value of money. This is because the lease bonuses are received in advance of production and royalties; hence, at any point in time the true value of lease bonuses received in the past is in excess of the nominal value of bonus payments associated with that production. Therefore, to the extent that inflation (or deflation) has occurred in the economy over a period of time, lease bonus payments should be adjusted upward (or downward) to reflect changes in the real value of the dollar between when the bonuses were received by the government and when the calculation of the government's "adjusted" royalty is being made.

A similar adjustment to the nominal bonus payments is necessary to reflect the time value of money. This is so because even if no inflation were to exist, one dollar today is worth more than one dollar to be received ten years from today. The appropriate method for taking into account the time value of money for a revenue stream to be received over a number of years is to express all dollars in constant dollars (i.e. adjust for the effects of inflation) and then to discount future revenues and inflate revenues received in the past by the real rate of interest, or discount rate, which is approximately 3.0 percent.

Exhibits 2 through 6 represent calculations of the effective government share of the value of production from Gulf of Mexico OCS leases sold between 1954 and 1970

and for all OCS leases sold during the period 1971 through 1977.

Exhibit 2 summarizes the bonus payments to the government for each group of leases, in nominal dollars, in constant 1978 dollars, and the present value of those bonuses in 1978 dollars. The nominal dollars computations simply reflect the addition of all government bonuses received during the indicated years. The constant dollars computations were made by applying the applicable implicit Gross National Product deflator to the nominal bonus payments received. The present value of the bonuses, in constant 1978 dollars, was calculated by inflating the value of the bonuses in constant 1978 dollars by 3.0 percent per year for the number of years between when the bonuses were received and 1978.

Exhibit 3 summarizes estimated production from Gulf of Mexico OCS leases sold during the period 1954-1970. Actual production, as reported by the U.S. Geological Survey (USGS), was used for the period 1955-1976. USGS estimates for 1977-2010 production from leases acquired during 1954-1969 were also adopted in the preparation of Exhibit 3.* Production decline analysis was used to project future production from Gulf of Mexico OCS leases sold in 1970.

Exhibit 4 summarizes the effective government share of total production revenues from leases acquired in 1954-1970. In nominal dollars, this adjusted royalty is only 21.2 percent. When the effects of inflation during the period 1954-1978 are taken into account, the government's share rises to 27.8 percent. When the present value in 1978 dollars, of bonus payments and royalties received over the 1954-2010 period is recognized. The Department of Interior's Final Environmental Impact Statement for OCS Sale 48 contains the following daily production estimates for the acreage originally proposed to be offered in that sale:

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* U.S. Geological Survey, Applied Research and Analysis Section, Report No. 79-8, November 27, 1978.

	Oil In 1000 Bbl./Day	Gas In MMcf/Day
1982	13.7	16.4
1983	57.5	69.6
1984	118.9	143.0
1985	187.7	225.8
1986	219.7	264.4
1987	216.0	259.7
1988	185.0	222.5
1989	147.0	177.0
1990	115.4	138.6
1991	92.4	111.0
1992	77.6	93.2
1993	67.8	81.4
1994	60.3	72.6
1995	54.3	65.2
1996	49.5	59.7
1997	45.5	54.8
1998	42.0	50.4
1999	39.3	47.1
2000	36.5	43.8

These production forecasts derived from recoverable resource estimates of 715 million barrels of oil and 860 billion cubic feet of gas. Subsequent to the issuance of the FEIS for Sale 48, a number of tracts were removed from the original list of leases to be offered. This resulted in the Department reducing its estimate of recoverable resources for the sale area to 104 million barrels of oil and 498 billion cubic feet of gas. However, no revised annual production forecast for the proposed sale area has been issued by the Department.

Exhibit 10 summarizes estimated annual production, production values between 1982 and 2000, and the value of government royalties for the 73 leases to be offered in Sale 48 pursuant to fixed, one-sixth royalty provisions. This exhibit was prepared by assuming that:

- The revised recoverable resource estimate for Sale 48 bears the same relation to production volumes

over time as did the original recoverable resource estimate to the production schedule contained in the FEIS for Sale 68; and

- Ultimate recoverable resources are uniformly distributed over the 148 remaining leases in the sale area.

Given these two assumptions, it is possible to estimate the total value of the royalties to be paid to the government, in constant 1978 dollars, from fixed, one-sixth royalty leases between 1982 and 2000. As shown in Exhibit 10, this figure approximates $267 million.

The Department of the Interior has estimated that the internal rate of return (IROR) earned by the oil and gas producing industry on all Gulf of Mexico leases sold during the years 1954-1969 ranges between 9.45 percent and 11.6 percent.* The 9.45 percent IROR estimate derives from a "middle regulation" product selling price scenario and the higher 11.6 percent IROR estimate was calculated under a "deregulation" product selling price scenario.

In my view, these rate of return estimates are totally inadequate as indicators of the actual returns that will be earned by the petroleum industry over the life of the productive leases acquired between 1954 and 1969. Moreover, and indeed far more importantly, irrespective of the actual rate of return earned on pre-1970 leases, those leases do not provide reasonable indicators of profitability for leases sold subsequent to 1969. This is because the bulk of the oil and gas resources located on pre-1970 leases was produced prior to the dramatic increases in oil and gas prices which took place after 1972.

In the absence of actual company drilling and operating cost data and reliable oil and gas reserves estimates, it is simply not possible to calculate with accuracy the

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* U.S. Geological Survey, Applied Research and Analysis Section, Report No. 79-8.

internal rate of return over the productive life for all OCS leases sold during the years 1954-1969. It is my understanding that the Department of the Interior IROR estimates derive from aggregated published drilling cost data from unduly conservative production forecasts based upon an extrapolation of recent production levels into the future. Moreover, future costs can only be estimated and therefore become subject to a wide degree of uncertainty. Thus, the Department's estimates of IROR on pre-1970 leases cannot be viewed as reflective of actual rates of return on that group of leases.

In addition, the Department's selection, for purposes of calculating the IROR on OCS operations, of pre-1970 leases is as previously stated, much of the ultimate production from that group of leases took place at low historical price levels. Second, by arbitrarily omitting the leases sold in 1970, for which the same amount and quality of data were readily available at the time the estimates were made, a significant downward bias in the ultimate IROR estimate was incorporated in the analysis. This is because it is widely recognized—both within and outside the petroleum industry—that the tracts leased in the December 15, 1970 OCS lease sale represent one of the most productive and profitable groups of leases ever sold by the Department. To illustrate, consider the following comparison:

	Value of Products Sold In Millions of Dollars	
	1969 Leases	1970 Leases
1970	$1.8	—0—
1971	7.3	2.0
1972	27.8	14.8
1973	42.3	210.0
1974	62.0	569.6
1975	63.6	972.9
1976	61.8	1,118.4
	$266.6	$2,887.7

There is simply no logical or reasonable basis for including leases sold in 1969—for which seven years of production history were available when the analysis was conducted—and not including leases sold in 1970—for which only one less year of production history was available—given the knowledge that $2.6 billion of additional revenues were associated with the group of leases omitted.

Lastly, most oil and gas production from the leases sold after 1969 will be priced at high world market prices, as opposed to the low prices associated with production from pre-1970 leases. In view of the pricing and output decisions of the Organization of Petroleum Exporting Countries and the rapid escalation of domestic oil and gas prices in this country, there is no meaningful relationship between the profitability associated with pre-1970 OCS leases and the profitability that will ultimately be realized on leases sold after 1969.

Exhibits 1 through 10 attached hereto.

DATED this 20th day of June, 1979.

/s/ George L. Donkin
GEORGE L. DONKIN

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

Subscribed, sworn to and acknowledged before me, a Notary Public in and for the State and City aforesaid, by George L. Donkin, on this 20th day of June, 1979.

/s/ Beth L. Fowler
Notary Public

My Commission Expires
February 14, 1984

EXHIBIT 1

QUALIFICATIONS OF GEORGE L. DONKIN

George L. Donkin is Vice President and Director of Petroleum Studies of J. W. Wilson & Associates, Inc.

Mr. Donkin holds a B.A. in economics from the University of Maryland and a M.A. in economics from that same university. He has been concerned with energy economics since 1970, when he became employed as an industry economist at the Federal Power Commission (now the Federal Energy Regulatory Commission).

From 1970 through September 1972, Mr. Donkin worked in the Area Rate Division of the FPC's Bureau of Natural Gas. This work related to various aspects of natural gas producer regulation, including analyses of gas production costs and the costs of finding and producing new natural gas and crude oil.

In September 1972, Mr. Donkin transferred to the Division of Economic Studies within the FPC's Office of Economics. His principal responsibilities there related to various phases of natural gas industry regulation.

In February 1974, Mr. Donkin became an independent economic consultant under a one-year contract with Cornell University. Much of his work during that year involved an analysis of the market structure of the petroleum and natural gas industries.

In February 1975, Mr. Donkin and others formed J. W. Wilson & Associates, Inc. Since the formation of J. W. Wilson & Associates, Inc., Mr. Donkin has undertaken numerous studies on behalf of federal, state and municipal governments, private enterprise, trade associations and nonprofit organizations on economic issues and problems in the general field of energy resources, transportation and utilization. These research projects have included the supply, transmission and distribution of energy; demand characteristics; cost characteristics; price structures; interfuel competition; and

regulatory policy; with particular emphasis upon petroleum and natural gas. A number of these studies have pertained to regulatory, antitrust and arbitration proceedings, and have been submitted as expert witness testimony in U.S. regulatory and court cases, and Congressional proceedings.

In February 1975, Mr. Donkin was appointed by the Chairman of the FPC to the Technical Advisory Task Force on Prospective Exploration and Development and Additions to Reserves of the National Gas Survey.

Mr. Donkin is a member of the International Association of Energy Economics.

The following is a summary of Mr. Donkin's expert testimony since 1973.

Before the Federal Power Commission and the Federal Energy Regulatory Commission:

In FPC Docket No. CI73-293, et al., testimony on behalf of Staff on the rate of development of offshore Louisiana oil and gas leases sold in the December 15, 1970 Federal lease sale.

In FPC Docket No. CP74-192, testimony on behalf of eight Florida cities on the extent and results of exploratory and developmental drilling activity in onshore and offshore areas of the Texas and Louisiana Gulf Coast producing areas.

In FPC Docket No. RP75-79, testimony on three occasions on behalf of eight Florida cities on economic issues relating to natural gas curtailment policies during periods of supply inadequacy.

In Docket No. RM77-13, testimony on behalf of the American Public Gas Association and the Consumer Advocate of the State of Pennsylvania on factors affecting the cost of finding and producing new natural gas supplies.

In Docket No. OR78-1, testimony on behalf of the Arctic Slope Regional Corporation dealing with competitive issues and the relationship of the undiscovered onshore and offshore crude oil resource base in North Alaska to tariff levels on the Trans-Alaska Pipeline System.

In Docket Nos. CP78-391, et al., testimony on behalf of the Ohio Consumers' Counsel on the extent to which a national need exists for supplemental coal gas supplies. This testimony dealt with the costs associated with conventional and non-conventional alternatives to gas supplies gasified from coal.

Before the Department of Energy:

Testimony on behalf of the Energy Policy Task Force of the Consumers' Federation of America on the competitive structure of the domestic petroleum industry and the need to monitor and/or regulate the price of No. 2 home heating oil.

Before the Michigan Public Service Commission:

Testimony on behalf of the Michigan Attorney General on the appropriate level of future annual natural gas sales to be used in establishing retail rates for Michigan Consolidated Gas Company.

Before the Ohio Public Utilities Commission:

Testimony on behalf of the Ohio Consumers' Counsel on policy concerning new gas customer additions and new loads for existing gas customers.

Before the United States District Court for the Eastern District of New York:

Testimony in 1976 and 1977 on behalf of the Counties of Nassau and Suffolk on the inadequacies in the U.S. Department of the Interior's assessment of the onshore and offshore resource base and an analysis

of the probable benefits and costs associated with crude oil and natural gas production from the Mid-Atlantic Outer Continental Shelf.

Before the United States Congress:

Testimony on matters relating to the structure of the U.S. oil and gas industries and offshore oil and gas producing operations before: Senate Committee on Judiciary, Subcommittee on Antitrust and Monopoly (October 1973); House Committee on Interstate and Foreign Commerce (March 1974); House Ad Hoc Select Committee on Outer Continental Shelf (November 1975); House Committee on Interstate and Foreign Commerce (February 1977); and House Committee on the Interior, Subcommittee on Mines and Mining (February 1977).

EXHIBIT 2

Summary Of Acreage Leased And Present Value Of Bonuses Received By The Government, 1954-1977

Year	Gulf of Mexico Leases: Number Of Leases	Gulf of Mexico Leases: Acreage	Bonuses In Thousands Of: Nominal Dollars	Bonuses In Thousands Of: Constant 1978 Dollars	Present Value 1978 Dollars
1954	109	461,870	$ 139,735	$ 356,045	723,766
1955	121	402,567	108,529	270,671	534,193
1959	42	171,300	89,747	202,200	354,559
1960	147	704,526	282,642	626,052	1,065,812
1962	420	1,924,535	489,481	1,055,321	1,693,480
1964	23	32,673	60,341	126,233	190,939
1966	41	139,773	188,011	372,450	531,025
1967	158	744,456	510,079	981,902	1,359,182
1968	126	570,986	743,768	1,370,021	1,841,194
1969	36	108,658	110,945	194,598	253,906
1970	138	598,540	945,065	1,573,281	1,992,985
1954-1970	1,361	5,859,974	$ 3,668,343	$ 7,128,774	$10,541,941
	All OCS Leases				
1971	11	37,222	$ 96,304	$ 152,540	$ 187,605
1972	178	826,195	2,251,348	3,424,075	4,088,525
1973	187	1,032,570	3,082,463	4,431,113	5,136,875
1974	356	1,762,158	5,022,861	6,584,442	7,410,847
1975	321	1,679,877	1,088,133	1,301,566	1,422,256
1976	246	1,277,936	2,242,898	2,550,257	2,705,568
1977	211	1,100,741	1,568,565	1,684,648	1,735,187
1971-1977		7,761,699	$15,352,572	$20,128,641	$22,686,863

Source: *Outer Continental Shelf Statistics*, Department Of the Interior, U.S. Geological Survey, 1977.

EXHIBIT 3

Estimated Total Oil And Gas Production, In Energy Equivalent Per Acre, From Gulf of Mexico OCS Leases Sold In 1954-1970

	1955-1976	1977-2010	1955-2010	Acreage Sold In 1,000 Acres	Oil & Gas Production Per 1,000 Acres Sold
(a) Quadrillion Btu	34.7	24.5	59.2	5,860	.0101
(b) Bcf of gas	34,672	24,517	59,189	5,860	10.10
(c) Million Barrels of Oil	5,779	4,086	9,865	5,860	1.68

EXHIBIT 4

Summary of the Effective Government Share of Total Production Value from OCS Oil and Gas Leases Sold Between 1954 and 1970

Line No.		In Nominal Dollars (1000's)	In Constant 1978 Dollars (1000's)	Discounted Present Value In Constant 1978 Dollars (1000's)
(1)	1954-1970 Bonuses	$ 3,668,343	$ 7,128,774	$10,541,941
	1955-1976 Production Revenue			
(2)	Gross Value	16,600,615	23,783,562	28,592,131
(3)	Royalty @ One Sixth	2,766,679	3,963,927	4,765,355
	1977-2010 Production Revenue			
(4)	Gross Value	63,676,200	39,985,100	32,244,600
(5)	Royalty @ One Sixth	10,612,700	6,664,200	5,374,100
	Government Share			
(6)	Lease Bonuses	3,668,343	7,128,774	10,541,941
(7)	Royalties	13,379,379	10,628,127	10,139,455
(8)	Subtotal	17,047,722	17,756,901	20,681,396
(9)	Production Value 1955-2010	80,276,815	63,768,662	60,836,731
(10)	Effective Government Share of 1955-2010 Production Value	21.2%	27.8%	34.0%

EXHIBIT 5

Summary of the Effective Government Share of Total Production Value from OCS Leases Sold in 1976

Line No.		In Nominal Dollars (1000's)	In Constant 1978 Dollars (1000's)	Discounted Present Value In Constant 1978 Dollars (1000's)
(1)	1970 Bonuses	$ 945,065	$ 1,573,281	$ 1,992,985
	1971-1976 Production Revenue			
(2)	Gross Value	2,887,790	3,509,721	3,841,964
(3)	Royalty @ One Sixth	481,298	584,954	640,327
	1977-2010 Production Revenue			
(4)	Gross Value	20,067,000	13,022,462	10,739,900
(5)	Royalty @ One Sixth	3,344,500	2,170,410	1,789,983
	Government Share			
(6)	Lease Bonuses	945,065	1,573,281	1,992,985
(7)	Royalties	3,825,798	2,755,364	2,430,310
(8)	Subtotal	4,770,863	4,328,645	4,432,295
(9)	Production Value 1971-2010			
(10)	Effective Government Share of 1971-2010 Production Value	22,954,790 20.8%	16,532,183 26.2%	14,581,864 30.%

EXHIBIT 6

Liquids and Gas Prices, In Constant 1978 Dollars,
Used to Calculate 1977-2010 Production Values For
Leases Sold During 1954 Through 1970

	1954-1969 Leases			1970 Leases		
Year	Liquids Price/Bbl.	Liquids Price/MMBtu [1]	Natural Gas Price/Mcf	Liquids Price/Bbl.	Liquids Price/MMBtu	Liquids Price/Mcf
1978	$ 9.21	$1.535	$ .650	$10.80	$1.800	$1.065
1980	10.59	1.765	.925	11.86	1.977	1.174
1985	15.00[2]	2.500	1.500	15.00[2]	2.500	1.500
1990	18.50[2]	3.083	2.400[2]	18.50[2]	3.083	2.400[2]
1995	22.50	3.750	3.366	22.50	3.750	3.366
2000	27,38	4.564	4.095	27.38	4.564	4.095
2005	31.75	5.291	4.748	31.75	5.291	4.748
2010	36.30	6.133	5.504	36.20	6.133	5.504

[1] Assumes 6 MMBtu per barrel of oil.

[2] Department of Energy, Energy Information Administration, current 1985 and 1990 price forecasts.

EXHIBIT 7

Estimated Effective Government Share of Total Production Value From OCS Leases Sold During The Period 1971-1977 If Productivity Per Acre Equals Average Productivity Per Acre From OCS Leases Sold During The Period 1954-1970

Present Value of Bonuses In Billions of 1978 Dollars	$22.7
Acreage Sold In 1,000's	7,717
Estimated Oil and Gas Production In Quadrillion Btu per Acre	.0101
Estimated Oil and Gas Production In Quadrillion Btu	77.9
Present Value of Oil and Gas Production In Billions of 1978 Dollars at Deflated Constant Dollar Price of $2.25 per MMBtu	$175.3
Present Value of Royalties @ One-Sixth of Production Revenues	$29.2
Present Value of Government Share (Royalties Plue Bonuses)	$51.9
Government Share As a Percent of Total Production Revenues	29.6%

EXHIBIT 8

Estimated Effective Government Share of Total Production Value from OCS Leases Sold During the Period 1971-1977 If Productivity Per Acre Is 25 Percent Greater Than the Average Productivity Per Acre from Leases Sold During the Period 1954-1970

Present Value of Bonuses In Billions of 1978 Dollars	$22.7
Acreage Sold In 1,000's	7,717
Estimated Oil and Gas Production In Quadrillion Btu per Acre	.0126
Estimated Oil and Gas Production In Quadrillion Btu	97.4
Present Value of Oil and Gas Production In Billions of 1978 Dollars at Deflated Constant Dollar Price of $2.25 Per MMBtu	$219.2
Present Value of Royalties @ One-Sixth of Production Revenues	$36.5
Present Value of Government Share (Royalties Plue Bonuses)	$59.2
Government Share As a Percent of Total Production Revenues	27.0%

EXHIBIT 9

Estimated Effective Government Share of Total Production Value from OCS Leases Sold During the Period 1971-1977 If Productivity Per Acre Is 25 Percent Less Than the Average Productivity Per Acre from Leases Sold During the Period 1954-1970

Present Value of Bonuses In Billions of 1978 Dollars	$22.7
Acreage Sold In 1,000's	7,717
Estimated Oil and Gas Production In Quadrillion Btu per Acre	.0076
Estimated Oil and Gas Production In Quadrillion Btu	58.5
Present Value of Oil and Gas Production In Billions of 1978 Dollars at Deflated Constant Dollar Price of $2.25 per MMBtu	$131.6
Present Value of Royalties @ One-Sixth of Production Revenues	$21.9
Present Value of Total Government Share (Royalties Plus Bonuses)	$44.6
Government Share As a Percent of Total Production Revenues	33.9%

EXHIBIT 10

National Production Value and Royalty Value of OCS Sale 48 Leases in Constant 1978 Dollars

	Estimated Annual Oil Production (1000 Bbls.)	Oil Price in Constant 1978 Dollars ($/Bbls.)	Value of Oil Production in 1978 Dollars (1,000's)	Estimated Annual Gas Production (MMcf)	Gas Price in Constant 1978 Dollars ($/Mcf)	Value of Gas Production in 1978 Dollars (1,000's)
1982	730.0	$14.00	$ 10,220	3,466	$2.48	$ 8,596
1983	2,920.0	14.25	41,610	14,711	2.59	38,101
1984	6,314.5	14.75	93,139	30,224	2.69	81,304
1985	9,964.5	15.00	149,468	47,725	2.76	131,722
1986	11,680.0	15.64	182,675	55,884	2.86	159,827
1987	11,461.0	16.31	186,929	54,890	2.96	162,475
1988	9,818.5	17.01	167,013	47,028	3.06	143,905
1989	7,811.0	17.74	138,567	37,411	3.17	118,592
1990	6,132.0	18.50	113,442	29,295	3.28	96,086
1991	4,891.0	19.24	94,103	23,461	3.39	79,533
1992	4,124.5	20.00	82,490	19,699	3.51	69,143
1993	3,613.5	20.80	75,161	17,192	3.63	62,405
1994	3,212.0	21.96	70,536	15,345	3.76	57,696
1995	2,883.5	22.50	64,879	13,781	3.89	53,608
1996	2,628.0	23.40	61,495	12,618	4.03	50,851
1997	2,409.0	24.34	58,635	11,583	4.17	48,229
1998	2,226.5	25.31	56,353	10,653	4.31	45,913
1999	2,080.5	26.32	54,759	9,955	4.47	44,499
2000	1,934.5	27.38	52,967	9,258	4.62	42,770
	96,834.5	$18.17	$1,754,441	464,179	$3.22	$1,495,325

Total Value of Oil and Gas In 1978 Dollars (1000's) $3,249,766
Percent of Total Leases (148) with Fixed Royalty (73) 49.3%
Estimated Production Value of Leases with Fixed Royalty (1000's) $1,602,135
Estimated Royalty Value of Leases with Fixed Royalty (1000's) ..... $ 267,022

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 79-1633

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, ET AL., DEFENDANTS

ANSWER TO COMPLAINT

First Defense

The complaint fails to state a claim for which relief can be granted.

Second Defense

The defendants answer the specific allegations of the complaint as follows:

1. Paragraph (1) contains no allegations of fact and requires no answer.

2. With respect to the allegations in paragraph (2), defendants are without knowledge or information sufficient to form a belief as to the place of residence of plaintiffs and deny that any causes of action have arisen.

3. With respect to the allegations in paragraph (3), defendants are without knowledge or information sufficient to form a belief as to their truth.

4. With respect to the allegations in paragraph (4), defendants deny any injuries and incorporate herein their responses to paragraphs (129)-(132) of the complaint.

5. With respect to the allegations in paragraph (5), defendants deny in subparagraph (a) that the United States holds title to all lands and resources of the outer continental shelf and aver that the United States claims the right to explore for and exploit the natural resources of the outer continental shelf. In subparagraph (c), defendants deny that James R. Schlesinger is the Secretary of the Department of Energy and aver that Charles W. Duncan, Jr. is the Secretary of the Department of Energy. Defendants admit the other allegations in paragraph (5).

6. With respect to the allegations of paragraph (6), defendants deny that they have not adhered to objectives specified by Congress. The remainder of paragraph (6) contains no allegations of fact and requires no answer.

7. With respect to the allegations in paragraphs (7)-(14), they are statements or interpretations of law relating to the early history of onshore mineral exploitation, and, to the extent that they are not accompanied by citations, defendants are without knowledge or information sufficient to form a belief as to their truth. Otherwise, the law speaks for itself and requires no answer.

8. With respect to the allegations in paragraphs (15)-(29), they are statements or interpretations of law regarding development and enactment of the Submerged Lands Act and Outer Continental Shelf Lands Act of 1953. To the extent they are not accompanied by citations, defendants are without knowledge or information sufficient to form a belief as to their truth. Otherwise, the law speaks for itself and requires no answer.

9. With respect to paragraph (30), defendants admit the statistics therein but deny all characterizations of the statistics, including the suggestion in the second sen-

tence that the pace of leasing after 1972 was not reasonable.

10. With respect to the allegations in paragraph (31), defendants deny the suggestion in the first sentence that industry opposition was the sole basis for not utilizing other bidding methods and deny the characterization here, and in every other part of the complaint, of the bonus bidding-fixed royalty system of bidding as the "bonus bidding-low royalty" system. Defendants deny the suggestion in the third sentence that all high bidders are awarded leases. Only bidders submitting high bids deemed by the Secretary to be sufficiently high are awarded leases. Defendants admit the other allegations in the paragraph.

11. With respect to the allegations of paragraph (32), defendants admit that from 1973 through March 1978 at two lease sales some tracts were offered by royalty bidding and that at every OCS lease sale at least a portion of the tracts were offered on a cash bonus-fixed royalty basis where the royalty was set at 16⅔% in the majority of cases. Defendants aver that since March 1978, the Secretary has employed a sliding scale bidding system to at least a portion of the leases offered. Defendants deny all other allegations or suggestions of paragraph (32).

12. With respect to the allegations in paragraph (33), defendants admit that the 1953 OCS Lands Act gave the Secretary substantial power to achieve the objectives of the Act and they deny all others.

13. Defendants deny the allegations in paragraph (34).

14. With respect to the allegations in paragraph (35), defendants admit that the Secretary has authority to conduct exploratory drilling and has not conducted or contracted for such drilling. Defendants deny all other allegations in paragraph (35) and aver that the Secretary requires, as a condition of pre-lease exploration permits, including exploratory drilling permits, that per-

mittees make all information obtained as a result of permit operations available to the Secretary.

15. Defendants deny all allegations in paragraph (36), and aver that they rely on nominations from industry as well as other sources in determining tracts to be offered for leasing.

16. Defendants deny the allegations in paragraph (37).

17. With respect to the allegations in paragraph (33), defendants deny the first sentence and deny any suggestion in the quotation that defendants have insufficient resource information before offering tracts for leasing.

18. With respect to the allegations in paragraph (39), defendants deny the first sentence. Defendants admit the statistics in the second and third sentences but deny all characterizations of the statistics, including the suggestion that single bid tracts are sold on a noncompetitive basis. Defendants deny the fourth sentence.

19. With respect to the allegations in paragraph (40), defendants admit the statistics in the second sentence, but deny the characterizations of the statistics and all other allegations in the paragraph.

20. With respect to the allegations in paragraph (41), defendants admit the statistics in the second and third sentences and deny the characterizations of the statistics and all other allegations in the paragraph.

21. With respect to the allegations in paragraph (42), the first clause is an interpretation of law requiring no answer and defendants deny the second clause.

22. Defendants deny the allegations in paragraph (43).

23. Defendants deny the allegations in paragraph (44) and aver that the cash bonus-fixed royalty bidding system is one of many factors which may affect a bidder's decision on whether to engage in joint bidding.

24. Defendants deny the allegations in paragraph (45).

25. Defendants admit the allegations in paragraph (46).

26. With respect to the allegations in paragraph (47), defendants deny the first sentence, admit the statistics in the second and third sentences, deny the characterizations of the statistics and deny the fourth sentence.

27. Defendants deny the allegations in paragraph (48).

28. With respect to the allegations in paragraph (49), defendants admit the first, third, fourth and fifth sentences. Defendants deny the second sentence and aver that many more smaller companies are participating in OCS lease sales than ever before.

29. With respect to the allegations in paragraph (50), defendants deny the first sentence, admit the statistics in the remainder of the paragraph but deny the characterizations of the statistics.

30. With respect to the allegations in paragraph (51), defendants deny the first and last sentences, admit the statistics as to leases awarded by joint bidding in the intervening sentences and deny the characterizations of the statistics.

31. With respect to the allegations in paragraph (52), defendants admit the statistics in the second sentence as to leases awarded by joint bidding and deny the characterizations of the statistics and all other allegations.

32. Defendants deny the allegations in paragraph (53).

33. With respect to the allegations in paragraph (54), defendants deny the first and last sentences and aver that the number of bidders is one indication of the success of a bidding system. Defendants admit the second sentence and accompanying citation.

34. Defendants deny the allegations in paragraph (55).

35. With respect to the allegations in paragraph (56), defendants deny the first and fourth sentences. The references in the second and third sentences are so unspe-

cific that defendants are without knowledge or information to form a belief as to their truth.

36. Defendants deny the allegations in paragraph (57) and aver that the statistics do not take into consideration that many of the bids referred to were submitted by joint bidders.

37. Defendants deny the allegations in paragraphs (58) and (59).

38. With respect to paragraph (60), the first clause in the first sentence is an interpretation of law requiring no answer and defendants deny all other allegations in the paragraph.

39. With respect to the allegations in paragraph (61), defendants deny the first sentence and aver that larger oil companies have acquired more leases than smaller oil companies by the cash bonus-fixed royalty bidding method as well as by alternative bidding methods and that the larger companies derive a substantial share of their assets and revenues from overseas production. As to the statistics in the remainder of the paragraph, defendants are without knowledge or information to form a belief as to their truth and defendants deny any suggestion that declining domestic oil production is the result of either OCS bidding system or foreign holdings of major oil companies.

40. With respect to the allegations in paragraph (62), defendants deny any suggestion that foreign holdings or operations of major oil companies is the reason for declining production in the United States and aver that the decline of production is the result of numerous factors. More specifically, defendants deny the first two sentences. Defendants are without knowledge or information sufficient to form a belief as to the truth of paragraph (62a). As for paragraph (62b), the description of the Foreign Investment Tax Credit and its operation in the first three sentences is a conclusion of law and requires no answer, and defendants are without knowledge or information sufficient to form a belief as to the truth of the fourth and fifth sentences of paragraph (62b). As for paragraph

(62c), defendants deny the first sentence. Defendants admit the statistics in the second and third sentences but deny the characterizations of the statistics and all other allegations in paragraph (62c). As for paragraph (62d), defendants deny the first sentence and admit the second sentence. Defendants deny the third and fourth sentences and aver that the OPEC nations began to play an assertive and aggressive role in world oil policy and that domestic oil prices have been lower than world prices.

41. With respect to the allegations in paragraph (63), defendants deny the first sentence. Defendants admit the statistics in paragraph (63a) and deny the characterizations of the statistics. Defendants deny paragraphs (63b) and (63c). As for paragraphs (63d), defendants admit that the citation to and quote from the Comptroller General's report is accurate but deny the conclusions of the report and the remaining allegations in the paragraph.

42. Defendants deny the allegations in paragraphs (64) and (65).

43. With respect to the allegations in paragraph (66), the interpretation of the OCS Lands Act is a conclusion of law requiring no answer and defendants deny the remainder of the first sentence. Defendants deny the second and third sentences.

44. Defendants deny the allegations in paragraphs (67)-(69).

45. With respect to the allegations in paragraph (70), defendants deny the first sentence. As to the second sentence, defendants admit that the quote regarding onshore leasing was made, but they deny the suggestion that the return to the Federal Government for federal offshore leases is inadequate when compared to the return to state governments for state offshore leases. The third sentence is a conclusion of law and requires no answer.

46. With respect to the allegations in paragraph (71) and (72) defendants are without knowledge or information sufficient to form a belief as to their truth.

47. With respect to the allegations in paragraph (73), defendants deny the first sentence and admit the second,

Defendants admit the third sentence except they deny that the tracts were selected at random. Defendants admit the statistics in the fourth sentence through the eighth sentence but deny the characterizations of the statistics and any suggestion that the use of other bidding systems has not promoted competition. Defendants deny the ninth sentence.

48. Defendants admit the statistics in paragraph (74) but deny the characterizations of the statistics.

49. With respect to the allegations in paragraph (75), defendants admit the first three sentences. Defendants admit the factual allegations of the fourth sentence but deny the characterization "most successful" and aver that the described results of the two sales referred to were opposite from the results of the other three sales.

50. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs (76)-(79), but defendants deny any suggestion that the United States is not receiving fair value for its leases or that it is not experimenting with alternative bidding systems in accordance with Section 8 of the OCS Lands Act, 43 U.S.C. 1337.

51. With respect to the allegations in paragraph (80), defendants deny the first sentence, and incorporate herein their answer to paragraphs (76)-(79) of the complaint. Defendants deny the second sentence.

52. Defendants deny the allegations in paragraphs (81)-(84).

53. With respect to the allegations in paragraph (81), defendants admit that the citation to the Department of Energy report is correct, except that the year of the report is 1979. Defendants deny the remainder of the paragraph and aver that the paragraph distorts the conclusions of the Department of Energy report.

54. With respect to the allegations in paragraph (86), in the first sentence defendants admit that in some instances the government has received significant payments for the right to develop oil and gas resources that prove not to exist and defendants deny the remainder of the

sentence. Defendants deny the second sentence and aver that a percentage of exploratory wells are dry holes. Defendants deny the third and fourth sentences.

55. Defendants admit the allegations in paragraph (87) and aver that the Rose memorandum was only a theoretical analysis and did not account for practical difficulties in administering a profit share system.

56. Defendants deny the allegations of paragraphs (88) and (89).

57. Defendants admit the allegations in paragraph (90) and aver that the entire report speaks for itself.

58. With respect to the allegations in paragraphs (91)-(95), defendants admit the statements in the Comptroller General reports are quoted accurately, but deny all other allegations including the statements or the accompanying summaries of them.

59. With regard to the allegations in paragraph (96), defendants admit that the FTC comments are quoted accurately, and they aver that with regard to the FTC recommendation defendants have issued draft regulations for experimenting with alternative lease payment systems in accordance with Section 8 of the OCS Lands Act, 43 U.S.C. 1337. Defendants deny all other allegations of paragraph (96).

60. Defendants deny the allegations of paragraph (97) and aver that defendants and others have viewed the bonus bidding-fixed royalty bidding with a critical eye and are experimenting with alternative systems in accordance with the mandate of the OCS Lands Act.

61. With respect to the allegations in paragraph (98), because the quotation is unaccompanied by a citation defendants are without knowledge or information sufficient to form a belief as to the accuracy of the quotation. Defendants deny the quotation and all other allegations of paragraph (98).

62. With respect to the allegations in paragraph (99), defendants admit that the assertions and conclusions of all persons are quoted accurately but deny that they are correct. Defendants aver specifically as to Sec-

retary Morton's statement that a rise in the price of oil after a lease sale does not necessarily render the economic terms of lease offered by the bonus bidding-fixed royalty system inadequate. Defendants deny all other allegations and suggestions of paragraph (99).

63. Defendants admit the allegations in paragraph (100) and aver that with the changes in the price of oil the Department of the Interior adjusts the price which it uses as one of several factors in evaluating tracts offered for leasing.

64. With respect to the allegations in paragraph (101), defendants admit the Committee statements, and defendants deny all other allegations including any suggestion that the bonus bidding-fixed royalty system does not promote competition and assure a fair return. Defendants aver that they are in compliance with the OCS Lands Act Amendments which were partly developed in this Committee.

65. Defendants admit the allegations in paragraph (102).

66. Defendants admit the quotations in paragraphs (103) and (104) and deny all other allegations and any suggestion that the bonus bidding-fixed royalty system does not promote competition and assure a fair return.

67. With respect to the allegations in paragraph (105), defendants admit that the Department of the Interior did not conduct its own exploration, deny the remainder of the paragraph and aver that they have experimented with bidding systems as mandated by the OCS Lands Act Amendments.

68. The allegations in paragraphs (106)-(118) are conclusions of law and require no answer. Defendants aver that the law speaks for itself.

69. With respect to the allegations in paragraph (119), defendants deny the first and second sentences and aver that 5 lease sales have been held since passage of the OCS Lands Act Amendments at which approximately half the leases were offered by the cash bonus-fixed royalty bidding method. The balance of the leases

were offered by the cash bonus-sliding scale royalty method. Defendants deny the third sentence. Defendants admit the statistics in the fourth through twelfth sentences but deny the characterizations of the statistics.

70. Defendants deny the allegations in paragraph (120), and aver that allegations incorrectly assume that leases jointly held by small and large companies are held solely by large companies.

71. Defendants admit the allegations in paragraph (121) and deny any suggestion of violations of the OCS Lands Act.

72. With respect to the allegations in paragraph (122), defendants admit the first, second and third sentences. Defendants deny the fourth sentence and aver that the United States is continuing to hold lease sales during the world shortage of oil and gas and rising prices. Defendants incorporate herein their answers to paragraph (99) of the complaint.

73. With respect to the allegations in paragraph (123), in the first sentence the reference to the OCS Lands Act Amendments of 1978 is a conclusion of law which requires no answer. Defendants admit that the Secretary of Energy has not promulgated final bidding regulations and defendants aver that the Secretary issued proposed regulations on three bidding systems on August 6, 1979. The second sentence is a conclusion of law and requires no answer. Defendants admit the third sentence. Defendants deny the fourth, fifth and sixth sentences except as to admitting the accuracy of the quoted segment of the fifth sentence.

74. Defendants deny all allegations in paragraph (124), except they admit that the Comptroller General's report is quoted accurately.

75. Defendants admit the allegations in paragraph (125), but they deny any suggestion in the fourth sentence that royalties increase on a step-by-step basis rather than on a semi-logarithmic basis and in the sixth sentence that Lease Sale No. 48 was in violation of the OCS Lands Act.

76. With respect to the allegations in paragraph (126), defendants admit the issuance of the report and deny all other allegations.

77. With respect to the allegations in paragraph (127), defendants deny the first sentence. Defendants admit the three quotations and deny the preceding summaries to the quotations. Specifically as to the quotations, defendants aver that the proponents espouse experimentation with profit share bidding systems; they do not state, as the allegations suggest, that the profit share systems are conclusively superior to other systems. Defendants deny the last sentence and aver that retaining the bonus bidding-fixed royalty bidding system for a percentage of leases, as was done for Lease Sale No. 48, is required by the OCS Lands Act.

78. With respect to the allegations in paragraph (128), defendants admit that the Comptroller General's report is cited and quoted accurately but deny that the conclusions quoted are correct and deny all other allegations or suggestions in paragraph (128).

79. Defendants deny the allegations in paragraph (129).

80. With respect to the allegations in paragraph (130), defendants deny the first sentence. As to the second sentence, defendants admit that federal revenues from OCS leases are deposited in the Treasury but deny the allegations of the remainder of the sentence.

81. With respect to the allegations in paragraph (131), the first two sentences are presumably conclusions of law and require no answer. Defendants deny the third and fourth sentences but admit that oil and gas are nonrenewable resources. The fifth sentence is presumably a conclusion of law and requires no answer. Defendants deny the sixth sentence.

82. With respect to the allegations of paragraph (132), defendants are without knowledge or information to form a belief as to the truth of the first sentence. Defendants deny the remainder of the paragraph.

83. Paragraphs (133) and (134) are conclusions of law and require no answer.

84. With respect to paragraph (135), the reference to Congressional authorization of alternative bidding systems in the first sentence is a conclusion of law requiring no answer and defendants deny the remainder of the sentence. Defendants deny the second sentence. The third sentence is a conclusion of law and requires no answer.

85. With respect to the allegations in paragraph (136), defendants deny the first three sentences and aver that the Secretary of Energy issued proposed regulations on three bidding systems on August 6, 1979, and that the Secretary of the Interior is able to utilize those three bidding systems. Defendants deny the fourth sentence but admit that regulations governing competitive review have not been issued. As to the fifth sentence, defendants admit the existence of the Comptroller General's report but deny its conclusions and all other allegations in the sentence.

86. Defendants deny the allegations in paragraph (137) and incorporate herein their answers to paragraphs (87), (99), (103)-(104), and (127) of the complaint in answering the first sentence. Defendants deny the second sentence.

87. With respect to the allegations in paragraph (138), defendants admit that in Lease Sale No. 48 and other sales the Secretary of the Interior has employed the cash bonus-fixing royalty bidding system and the cash bonus-sliding scale royalty system and defendants deny all other allegations.

88. Defendants deny the allegations in paragraph (139) and aver that they are using bidding systems as mandated by the OCS Lands Act.

89. With respect to the allegations in paragraph (140), the first sentence is a conclusion of law and requires no answer. Defendants deny the second sentence.

90. Defendants deny the allegations in paragraphs (141)-(143).

91. The allegations in paragraphs (144) and (145) are conclusions of law requiring no answer.

92. With respect to the allegations in paragraph (146), defendants aver that the Secretary of the Interior's utilization of the cash bonus-fixed royalty bidding method is in accordance with the mandates and objectives of the OCS Lands Act and defendants deny all other allegations.

93. Defendants deny the allegations in paragraphs (147)-(150).

94. The allegations in paragraph (151) are conclusions of law and require no answer.

95. Defendants deny the allegations in paragraph (152)-(155).

96. With respect to the allegations in paragraph (156) and (157) defendants admit the Comptroller General's reports are accurately quoted but deny the conclusions of the reports. Defendants deny all other allegations in the paragraphs.

97. Defendants deny the allegations in paragraphs (158) and (159).

98. Further defendants deny each and every allegation of the complaint not specifically admitted.

WHEREFORE, defendants respectfully request that the Court enter judgment for defendants, dismiss the complaint and order such additional relief as may be deemed appropriate.

Respectfully submitted,

JAMES W. MOORMAN
Assistant Attorney General

BRUCE C. RASHKOW
Attorney, Department of Justice

/s/ Charles W. Findlay, III
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Dated: October 26, 1979

U.S. EXHIBIT NO. 6

A PRESENTATION TO THE OCS ADVISORY BOARD

December 15, 1978

H. Theodore Heintz, Jr.
Assistant Director, Office of Policy Analysis
U.S. Department of the Interior

* * * * *

II. *Patterns of Bidding*

The most obvious statistics to examine regarding OCS lease sales are the number of bids per tract and the bonuses. For all leases awarded from 1954 through 1977, there have been 3.25 bids/tract and bonuses averaged $1326 per acre. In looking at these statistics, one discovers however, that behind the simple averages lie some interesting patterns. OCS oil and gas, though a very valuable resource, is very unevenly distributed throughout the OCS. The locations and sizes of hydrocarbon reservoirs are initially unknown and can only be determined by costly exploratory drilling. Given these uncertainties, oil and gas leases convey a mineral right to a resource that frequently, if not usually, turns out not to be present in a given tract. Typically, there is a small chance of finding oil and gas on most tracts. On the better prospects there is a slightly better chance. Most discoveries are modest in size, but there are a few that are very large. The very high value of large reservoirs once they are found makes it worth the high cost of exploration. What we see behind the averages reflects this pattern of resource distribution and the risk taking behavior necessary to find oil and gas.

As you might expect, bidding is more intense in lease sales that offer better prospects. The Mid-Atlantic Sale in August 1976 drew 4.06 bids/tract and yielded over a billion dollars in bonuses, an average of $2130 per acre

leased. But six months earlier, a Gulf of Mexico sale drew only 1.44 bids/tract and yielded $176 million at $1090 per acre. Our most recent Gulf of Mexico sale (#65), drew 1.77 bids/tract and yielded $61 million in bonus revenues at $304 per acre. It is important to recognize that in each case, many tracts offered drew no bids. Also, to assess the levels of competition, one must keep in mind that our bid counts don't reflect the number of zero bids—firms that considered bidding on a tract and were potential competitors, but decided not to enter a bid.

The pattern of greater competition on better prospects is even more evident in comparing bids on individual tracts than in comparing sales. Table 1 gives some interesting statistics for the 3220 leases awarded through 1977.

Note that a very high percentage of the tracts, 39%, received only 1 bid. These tracts clearly pull the overall average down substantially. They also contributed a disproportionately small amount to total bonus value collected—only 10%. These tracts were clearly viewed as poor prospects at the time of the sale.

Their production histories confirm these expectations. Only 9% of the leases on tracts receiving 1 bid have had production. This 39% of the leases accounted for only 17% of the value of production.

Similarly, 19% of the leases received 2 bids and produced 8% of the total bonus value. Of these slightly better prospects, 15% have had production, providing about 16% of the total value of production.

Looking at the bidding on better prospects, we see that 42% of the leases drew 3 or more bids while yielding 82% of the bonus value collected. Drilling outcomes confirm the expectations of bidders. More of these tracts, 22%, have had production and their percentage of the total value of production has been disproportionately higher: 64% for this 42% of the leases.

Table 1

Summary of Bidding Patterns

Number of Bids Received	Percent of All Leases Issued	Percent of Total Bonus Value Collected	Average of High Bids ($ millions)	Productive Leases as a Percent of Leases Issued	Value of Production as a Percent of Total Value of Production	Value of Production Per Acre ($ thousands/acre)
1	39	10	1.5	9	17	1225
2	19	8	2.5	15	16	1437
3, 4	19	19	5.8	20	21	1442
5, 6, 7	13	25	10.8	21	19	2729
7	10	38	20.8	29	27	3216

1. Data for 3220 leases issued in 1954-1976 period.
2. All dollar values expressed in 1975 dollars.

Another way to see this pattern is to look at how much is bid for tracts receiving different numbers of bids. These data are shown in Figure 1. A full 77% of the leases receiving 1 bid were under $1.3 million in bonus. (1975 dollars have been used in aggregating these statistics.) Only 6% of these leases brought bonuses over $5 million. The average was $1.5 million.

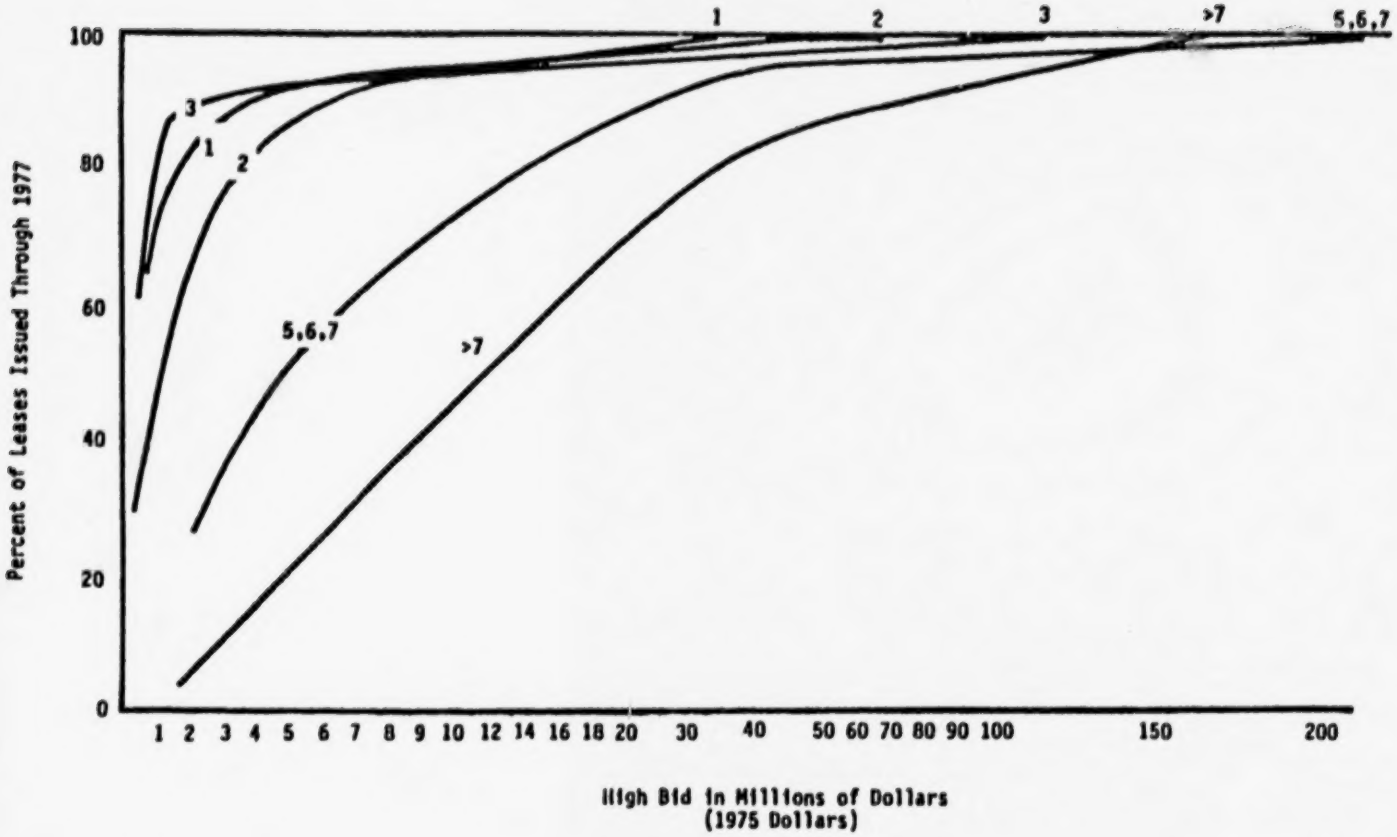
As we look at leases drawing more bids, the pattern gradually shifts, decreasing the portion of bids at lower dollar levels and increasing the portion at higher levels. For 2-bid tracts, 58% were under $1.3 million and the average was $2.5 million. For 3- and 4-bid tracts, 88% were under $1.2 million, but the average had moved up to $5.8 million. For 5-, 6- and 7-bid tracts, only 27% were under $2.1 million while 52% drew over $4.2 million. The average was $10.8 million. For leases drawing more than 7 bids only 5% were under $1.7 million while 76% were over $5 million. The average was $20.8 million, but this set includes a few very good prospects: 20% of these leases drew over $35 million.

These patterns show that many tracts are leased without strong competition, but that far fewer such low-competition leases have economically producible reservoirs. Firms awarded such leases pay smaller bonuses for riskier prospects. Conversely, most of the production occurs from tracts which drew moderate or strong competition. Firms winning these leases paid substantially higher bonuses. In summary, competition for the oil and gas resource is much stiffer than indicated by the average number of bids per tract.

These observations are important to our thinking about the potential gains for improving competition over past levels. If we are trying to increase Federal revenues for the resource, then the opportunities for gains from competition alone may be limited. Several theoretical studies have shown that the seller captures a higher portion of the rent as the number of bidders in an auction in-

FIGURE 1

CUMULATIVE PERCENTAGE DISTRIBUTION OF HIGH BIDS
FOR TRACTS DRAWING DIFFERENT NUMBERS OF BIDS



creases. They also show, however, that the percentage gains become relatively smaller as the number of bidders increases. For example, while increasing from 2 to 3 bidders gives a theoretical gain of 11% of the rent, according to work by Robert Wilson, increasing from 3 to 4 gives 4% and from 4 to 5, only 2%.

Thus, while overall increases in the number of bidders would be beneficial, the potential revenue gains from increasing competition on low-competition tracts are limited by their poor prospects. On the other hand, potential revenue gains from increasing competition on better prospects are limited because the number of bidders is already great enough to capture most of the rent for the government.

III. *Rates of Return*

Another way to judge the performance of a bidding system is to determine if the bidders are reaping surplus profits on their leases. An ideal bidding system would capture for the government all but the "normal" profits required to lure investment into the OCS oil and gas business. A number of difficulties are faced in trying to measure profits on the OCS. We do not have a substantial body of data on actual expenses incurred by our lessees in exploring and developing individual tracts. Company accounting practices in the past have not provided such separate accounting.

A second difficulty is that many tracts will be in production for years to come. Future production is not on the books yet, but it will provide the return on investment in exploration and development. To include future production revenues in the estimation of rates of return, it is necessary to project both production and future prices.

Some of these difficulties can be overcome, however, especially if we are less concerned with the profits on individual leases, and more concerned about fair return to

the public for OCS resources in general. It is clearly possible for a few leases to produce extraordinary profits. Some discoveries are clearly beyond expectation. It is also possible for a few leases to produce extraordinary losses. Firms in the OCS oil and gas business face these possibilities every time they acquire a lease or invest in exploratory drilling. It is not likely that a firm will be able to win leases on only the most profitable tracts. In looking for opportunities for improvement, we are more interested in overall patterns. It is appropriate, therefore, to look at overall rates of return for OCS leases and for subsets of OCS leases with different characteristics.

Staff of the U. S. Geological Survey have tackled this challenging task using drilling and production data for leases issued through 1969. Later leases were not included because of uncertainties about future discoveries and resulting production. By estimating the costs of drilling and development and projecting past production into the future by decline analysis, it is possible to estimate internal rates of return for the estimated cash flow streams associated with various aggregates of leases. Some very interesting observations emerge.

A word about rate of return is needed before we get into the statistics. The internal rate of return is the interest rate at which an investment can be financed and still break even. It is a measure of profit that is closer to true economic profit than the definitions of profit used in reporting income to the IRS or in corporate profit and loss statements. It is a good tool for judging whether returns are "normal" because it allows comparison with other investments whose rates of return are easily known —savings accounts and government bonds, for example.

The rate of return analysis for all leases issued through 1969 shows an aggregate rate of return of 8.92%. That's the interest you could have paid to finance your business

had you been a single lessee acquiring and operating all leases, paying the bonuses that have been paid, and drilling and producing as OCS lessees have. Because these estimates are particularly sensitive to assumptions about future production and prices, it's really best to think of ranges. With higher prices such as could result from full deregulation, the rate of return is estimated to be 10.8%. A slower decline in production from these leases —10% rather than 15%—would result in an aggregate rate of return of 10.7%. Similarly, lower prices or more rapid production decline would give lower rates of return —in the order of 6 to 7%.

Again, behind this aggregate figure lie the same sort of patterns that we saw in the bidding. Most of the 1223 leases have had no production. Their rates of return are negative because the investment in bonus payments and exploratory drilling yielded no revenue. Only 447 of the set have had production. Of these, 276 have positive rates of return when production is projected to decline at 15% per year. Leases with negative return pull down the aggregate rate of return just as they pull down the profits of the firms who acquired those leases. The distribution of rates of return on these tracts which are "in the black" is shown in Table 2. Of the 276 tracts

Table 2

Distribution of Internal Rates of Return
for 276 Tracts "In the Black"
(Leases Issued Through 1969)

Internal Rate of Return		Percent of Tracts In the Black	Percent of All Leases
>0	≤10	27	6
>10	≤20	40	9
>20	≤30	15	3
>30		19	4

estimated to have positive rates of return, 27% have rates less than 10% and 40% have rates between 10% and 20%. 15% have rates between 20% and 30%. And

19% of the tracts with positive rates are over 30%. There are clearly a few tracts that produce high profits. They amount to about 4% of the 1223 leases analyzed.

The goal for a bidder is clearly to acquire only high profit tracts. An examination of rates of return for individual bidders shows that this is difficult if not impossible. For those firms ranking in the top 20 in acreage, the highest estimated rate of return is 14%. One firm in this group shows zero return. Uncertainty about the location of the resource appears to guarantee that firms will take the bad with the good.

It is useful in assessing opportunities for improvements in bidding systems to examine the effect of bidding patterns and bonus payments on rates of return. Figure 2 shows the relevant data. Bonus payments have clearly reduced the rates of return achieved by lessees. Without bonus payments, the 8.92% aggregate rate of return would have been 17.1%. In a sense, this is society's rate of return. The effect of bonus payments is to divide up this total return so that investors get 8.92% and taxpayers get the rest. It is clear that tracts drawing higher bonus payments turn out to be more beneficial to society: tracts with bids exceeding $3.25 million had an aggregate rate of return of nearly 20% not considering bonus payments. On the other hand, tracts receiving $.25 million or less yielded only 11% return. Note also in Figure 1 that the effect of bonus bids is to reduce the rates of return on high bid tracts disproportionately more than on low bid tracts. The result is that the rate of return when bonus payments are considered is almost the same for all intervals of bonus value.

Figure 2 also shows that rates of return, absent bonus, tend to be higher for tracts that drew more bids. Even more importantly, the bonus payments on high-competition tracts drive the rates of return lower than they do on low-competition tracts. This is clearly the desirable effect of competition that we seek to promote.

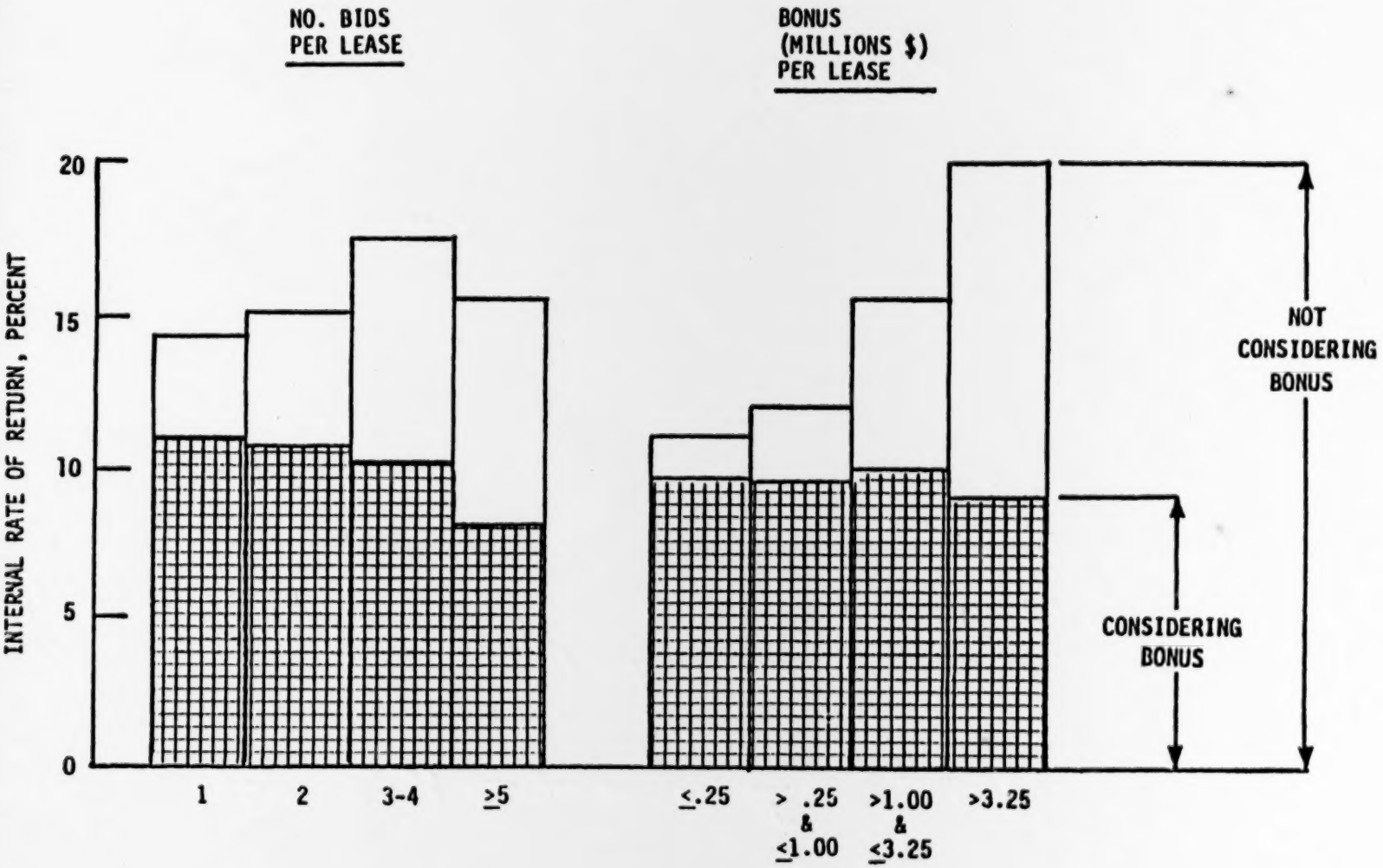


FIGURE 2

INTERNAL RATES OF RETURN FOR LEASES AGGREGATED ACCORDING TO NUMBER OF BIDS AND BONUS PER LEASE

Our analysis shows one other interesting trend. Rates of return, absent bonus, appear to be increasing somewhat on later leases. We would expect this trend to be sharper for post 1969 leases because of the escalation of the world price of oil. The rate of return, absent bonus, on leases now being awarded should be significantly higher. However, when bonus is considered, there is, if anything, a decline in the rate of return over time.

Our analysis has also examined rates of return for the aggregate of leases held by firms of different classes. Surprisingly enough, the Big 8 firms show lower return than smaller firms.* The aggregate rate of return for the Big 8 is 8.2% while the rest of the top 20 earns 11.1% as compared with firms not in the top 20 whose aggregate rate is 9.7%. As a whole, the Big 8 seem to do more drilling, get less production per well and less production per acre. These factors appear to contribute to their lower rate of return on OCS leases.

* * * * *

V. *Risk Sharing*

The patterns we have seen in bidding and rates of return demonstrate the risks of acquiring OCS leases. Our analyses of bidding behavior under various bidding systems has identified risk sharing as a potential source of improvement which is, to some extent, independent of the benefits from improved competition. It is evident from the discussion above that bidders under the cash bonus bidding system must risk and endure substantial losses of bonuses and exploration costs in order to find and reap the profits from the few tracts with reservoirs of oil and gas. For each tract, there is a substantial risk of loss to the winning bidder. For some bidders, large

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* For purposes of this analysis, the "Big 8" refers to the following set of firms: Amoco, Atlantic Richfield, Chevron, Exxon, Gulf, Mobil, Shell and Texaco. The rest of the top 20 include: Amerada Hess, Cities Service, Continental, Forest, Getty, Marathon, Phillips, Signal, Sun, Superior, Tenneco, and Union.

losses are more damaging per dollar than small losses. This is especially true for potential losses that could threaten the financial soundness of the firm or seriously disrupt its future investment plans.

Most of us would be willing to risk $1 for a lottery ticket with a 1-in-a-thousand chance of winning $1000. But we're less likely to risk $1000 on a lottery ticket with a 1-in-a-thousand chance of winning $1 million even though the jackpot and the ticket price have been scaled up by the same factor. Loss of $1000 is more than 1000 times more painful than loss of $1. Firms may exhibit the same sort of risk aversion in bidding large sums on the better prospects on the OCS. As a result, bonus bids would be reduced or discounted. We would expect this discounting to be more severe in the bids by smaller firms. Thus, if the risk confronted by bidders can be reduced, bids should increase, especially on better prospects, and smaller firms should be able to bid on a more even footing with larger firms.

The bidding systems on which we are focusing our efforts offer the best opportunities for shifting risks from the bidder to the government and the taxpayer. They do this by shifting government revenue from the up-front cash bonus to a form of payment which depends upon finding and producing the resource. Royalty bidding, sliding scale royalty and profit sharing systems all have this feature. Without discussing these systems in detail, it should be pointed out that they can have the potential effects on the "size of the pie" that are not desirable. High royalty rates can cause incentives to produce less oil and gas. And profit sharing, though it should help avoid such incentives, involves much higher administrative costs than other systems. We think the profit sharing system is the best opportunity for improvement. Our testing program is directed toward measuring in practice the gains in bidding and the costs of administering the system. We would like to report to you at future

meetings on our analysis of the performance of these systems, especially those we have tested in recent sales, and on our plans for bidding system tests in future sales.

VI. *Conclusions*

In summary, the statistics we have examined show that:

1. There is wide variation in and great uncertainty about the value of individual OCS tracts.
2. While competition can be improved, the resulting gains in assuring fair return to the public will probably be modest because much of the resource has been leased under moderate or strong competition.
3. Although rates of return are very high for a few tracts, the uncertainty about which tracts will yield such payoffs has prevented any firm or group of firms from reaping abnormally high profits overall.
4. Estimated rates of return have been substantially reduced by the payment of bonuses.
5. OCS holdings do not appear to be so highly concentrated as to offer substantial improvements in fair return from antitrust actions.
6. Risk sharing through new bidding systems offers a good opportunity to improve the return to the public from OCS leasing.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 79-1633

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, ET AL., DEFENDANTS

AFFIDAVIT OF H. THEODORE HEINTZ, JR.

I, H. THEODORE HEINTZ, JR., having been duly sworn, state as follows:

1. I am an Economist serving as Assistant Director of the Office of Policy Analysis, U.S. Department of the Interior. I have been responsible for policy and economic analysis concerning a variety of OCS policies over the past four years. Along with other staff of the Office of Policy Analysis, I have been directly involved in the analysis of bidding systems and their performance and the development and testing of various bidding systems.

2. I have reviewed the two memoranda of the plaintiffs filed on June 28, 1979 and July 11, 1979, in support of their two motions for modification of this Court's order of June 27, 1979 (hereinafter referred to as the first and second memoranda). These memoranda are based on several improper assumptions from which plaintiffs draw incorrect conclusions about the capability of alternative bidding systems to assure receipt of fair market value for OCS oil and gas leases, and about the bidding results of OCS Lease Sale No. 48. Plaintiffs make several improper assumptions which I will explain below.

"FAIR VALUE" AND "FAIR MARKET VALUE"

3. Plaintiffs refer interchangeably to a statutory objective to obtain "fair value," "fair return", and "fair market value" for leases, e.g. first memorandum, p. 2; second memorandum, pp. 1-3, 6-8, 10-12. Plaintiffs even suggest that "fair market value" means a higher return than "fair return," second memorandum, pp. 7, 10. There is some confusion of terms in the statute and plaintiffs are simply attempting to exploit that confusion in their attack on the use of the bonus bidding-fixed royalty system.

4. The compensation required for OCS leases is a "fair and equitable return" to be determined by balancing other goals, such as making OCS oil and gas resources "available to meet the Nation's energy needs as rapidly as possible" and balancing orderly development with protection of the environment, 43 U.S.C.A. 1802 (2). The Conference Report on the 1978 amendments to the OCS Lands Act also confirms this standard. H. Rep. No. 1474, 95th Cong., 2d Sess. 79 (1978).

5. Neither the Act nor plaintiffs suggest a definition of the compensation the Department of the Interior must obtain for leases whether it is referred to as "fair value," "fair return", or "fair market value." In the absence of such a definition, it is necessary to understand how the value of a resource arises and how that value is related to the price that is paid for a mineral right to that resource.

6. Plaintiffs equate receipt of fair market value with capturing a high proportion of the value of the oil and gas produced. As a result, they favor royalty bidding and other high royalty systems. This reflects an inadequate understanding of the basic economic concepts of value which, if used as the basis for leasing policy, would cause substantial losses in revenue to the Federal government, as well as substantial losses in oil and gas production.

7. The central error in plaintiff's notion of fair market value is that the value of the oil and gas produced is all that need be considered. This would be correct if the Federal government were selling oil from storage tanks with negligible costs for delivery and meters to tell with certainty the amount of oil delivered. It is clearly not the correct concept for the sale of leases which convey mineral rights to a resource when substantial costs must be incurred to bring the resource to market and when the presence, extent, and quality of the resource are substantially uncertain.

8. The failure to consider costs and uncertainty is a major flaw in the analyses presented by plaintiffs which vitiates almost every statement they make about fair market value. The flaw in neglecting costs is easy to demonstrate. Even if it were certain that a tract contained recoverable oil and gas resources which could be sold for $500 million, no firm would pay $500 million for a lease conveying the mineral rights for that tract. Any firm acquiring such a lease would consider the costs it would be likely to incur at locating, extracting, and transporting the resources to market. If such costs amounted to $100 million, including taxes and normal return on investment, then clearly a firm would be willing to pay up to $400 million for the lease. Similarly, if costs were $400 million, then a firm would be willing to pay up to $100 million for the lease.

9. The seller of such a tract would clearly want $400 million in the first case or $100 milion in the second, since he could gain that much by incurring the costs and selling the produced resource himself. Economists call these profits which are above the normal return on investment the economic rent of the resources. If markets operated perfectly, including perfect knowledge about all of the factors that determine such economic rents, then market value and economic rent would be identical. Markets have many unavoidable imperfections, however, which make the fair market value less than the economic rent. In

OCS oil and gas development, the most important market imperfection results from the high investment costs of exploring and developing a tract and the unavoidable uncertainty about the presence and extent of the resource.

10. Thus it is clear that the market value of a lease depends as much on the costs as on the production revenues. Since both costs and resources vary from tract to tract and from area to area, it is impossible to draw valid conclusions about the receipt of fair market value based only on analysis of the aggregate of Federal receipts compared to the aggregate of production revenues.

11. In the sale of a lease, the bidding system determines the way in which the lessee will pay the lessor. At a fixed 16⅔% royalty on $500 million in production, the royalty payments would be $83.3 million in both examples provided above, regardless of costs. In a perfect market with no uncertainty, a competitive lease sale would capture all of the economic rent. This would leave $316.7 million for bonus if costs were $100 million and $16.7 million for bonus if costs were $400 million. The table below compares these two cases:

	$100 million costs	$400 million costs
Government's share of $500 million production revenue	80%	20%
Government's share of economic rent	100%	100%

It is clear from this table that even under theoretically perfect competition, the Federal share of production revenue from a cash bonus bid with fixed royalty depends directly upon the costs. Because of this, and the fact that many of the tracts offered in Lease Sale No. 48 will have relatively high exploration and development costs, no valid conclusions can be drawn from plaintiffs' analysis of the Federal share of production revenues from Lease Sale No. 48 tracts.

DISADVANTAGES OF ROYALTY BIDDING

12. Using this incorrect assumption about fair market value, plaintiffs wrongly conclude that higher royalty rates will assure receipt of fair market value by yielding higher Federal shares of production revenue, e.g. second memorandum, pp. 4-5, 9, 17, 19-20. Setting aside for the moment any effects on the number of bids or on risk averse bidding, higher royalties generally mean lower bonuses. The primary effect of higher royalty rates in the cases above would be to delay the receipt of Federal revenues by decreasing front end bonus payments and increasing royalties during the production phase. This in itself is not likely to improve receipt of fair market value.

13. There is a strong possibility, particularly under royalty bidding, of setting the royalty rate so high that the royalty payments would exceed the economic rent. When this occurs, it is impossible for the lessee to make a normal return on investment in development of the tract. In such cases, the high royalty rate prohibits development of the tract, the Federal government receives no royalties, and the country loses the oil and gas production that would have occurred at a lower royalty rate. This would result, for example, if the royalty rate on the $500 million of production were 25%. Following plaintiffs' concept, this would be assumed to yield $125 million in royalty payments. But if the tract would cost $400 million to explore, develop and produce, potential lessees would face a $25 million loss. Thus, the plaintiffs' estimate of the Federal share of production revenues under higher royalties that ignore costs are not only misleading with regard to fair market value, but they are also inherently overstated. In many cases, revenues would never materialize at high royalty rates.

14. Royalty bidding, which plaintiffs claim as proof that firms are willing to give the government a higher share of production value, is particularly damaging in this regard. Firms bid high royalty rates while paying minimal bonuses, because they are willing to gamble rela-

tively small bonus payments on the small chance that a reservoir is found that is big enough relative to its costs to produce economically, even at the high royalty rate bid. If a smaller reservoir is found that is uneconomical to produce at the high royalty rate, the firm has lost only its minimal bonus, but the Federal government has lost all royalty revenue and production has been foregone until the tract can be reoffered under lease terms that make production economical.

EFFECT OF PRICE INCREASES ON FAIR VALUE

15. Plaintiffs assert that fair value cannot be obtained without higher royalty rates because the price of the resource has increased dramatically since 1973, second memorandum, p. 8. This argument, however, fails to take into account the fact that the bonuses bid in a competitive situation will reflect current expectations of higher prices and transfer the resulting increases in value to the government. Even where prices far exceed these expectations at the time of the lease sale, it cannot be said that fair value was not received for the leases at the time they were issued, since neither the lessee nor the lessor anticipated the higher (or lower) prices at the time of the transaction.

NUMBER OF BIDS RECEIVED AS AN INDICATOR OF THE LEVEL OF COMPETITION IN OCS LEASE SALE NO. 48

16. Plaintiffs argue that the average number of bids per tract in Lease Sale No. 48 demonstrates an inadequate level of competition, second memorandum p. 14. However, this assertion ignores several important facts and relies on certain invalid assumptions.

17. An analysis of the data for Sale 48 (summarized in plaintiffs' Appendix A of the second memorandum) reveals some patterns in competition which refute plaintiffs' claims about the inadequacy of competition and the

effects of possible barriers to participation on receipt of fair market value. The results of this analysis are summarized in Table I (following page). Because geology dictates that oil is present in only a few tracts, averages over all tracts such as the average number of bids per tract can be misleading. Although the average for Lease Sale No. 48, 2.04, seems low, it is not a result of the asserted weakness in cash bonuses. In fact the average is held down by the high proportion of one-bid tracts, 56%, and two-bid tracts, 16%. Bonuses bid on these tracts were modest, averaging $2.1 million and $6.1 million, and accounting for only 8.1% and 11.1% of the total bids received. These bonus bids are not high enough to prohibit participation by any bidder capable of financing subsequent exploration and development. The low number on these tracts reflects limited prospects for discovery of oil and gas, not a failure of the bidding system to encourage competition. In fact, as documented in U.S. Exhibit No. 6, p. 5, experience shows that one- and two-bid tracts have proven to contain significantly less resource than tracts that receive more intensive bidding. For example, single bids account for 39% of all tracts leased in the 1954-1976 period, but account for only 19% of all production, U.S. Exhibit No. 6, Table 1.

18. It is also important to note that bidders on one-bid tracts behave as if they had competition because they have no way of knowing that no one else will bid. This results in the sale of leases on one-bid tracts for significantly more than would have been bid had the bidder been aware that he was the only bidder. In fact, bids of $38.7 million, $17.1 million, $10.3 million, and $8.2 million were received on one-bid tracts.

19. At the other end of the spectrum, 40% of all the money bid in Lease Sale No. 48 is on six- and seven-bid tracts. This intensive bidding had little effect on the average number of bids per tract because it was concentrated on only 6% of the tracts receiving bids. The relatively high levels of cash bonuses bid on these tracts, an aver-

Table I

Comparison of Bids Received in the 06/29/79

California Sale

Number of Bids Received Per Tract	Number of Tracts	% of Tracts	Average Bonus Bids	Total Amount Bid	% of Total Bid in Sale 48
1 bid	31	56	$ 2.6	$ 81.0	8.1%
2 bids	9	16	$ 6.1	$110.0	11.1%
3 bids	6	11	$ 3.0	$ 54.4	5.5%
4 bids	4	7	$13.2	$211.7	21.3%
5 bids	2	4	$13.1	$130.9	13.2%
6 bids	2	4	$30.0	$360.2	36.2%
7 bids	1	2	$ 6.6	$ 45.9	4.6%
Total	55	100		$994.1	100

age of $21.4 million, have evidently not prevented competition that is clearly of sufficient intensity to assure fair market value.

20. In conclusion, this analysis shows

(1) that on poor prospects, bonus levels are sufficiently low that they present little barrier to participation;

(2) that the likely amount of resource and potential revenue for poor prospects is quite low, thus the likelihood of losses in Federal revenue due to lower intensity of competition is also quite low.

(3) that bids reflect the bidders' expectations of competition even on one-bid tracts;

(4) that leases for the best prospects receive intense bidding even though cash bonuses are relatively high;

(5) that most of the potential resource is leased under intense competition for a relatively small portion of the tracts offered;

(6) that the average number of bids per tract is dominated by the much larger number of relatively poor prospects, thus giving rise to the misleading implication that most OCS oil and gas is leased under low competition.

21. Plaintiffs assert (second memorandum, p. 20) that the report offered as U.S. Exhibit No. 6 in hearings on their original motion *"has not the slightest bearing on the pending question whether the Government can be assured of receipt of fair market value from 1/6 royalty leases granted in 1979"* [plaintiffs' emphasis]. This is clearly an incorrect assertion. The Plaintiffs have asserted in their complaint (¶ 82):

> "The failure of the cash bonus, low royalty system to assure or achieve receipt of fair value has not resulted from a unique set of circumstances but is an inevitable consequence of the system itself."

This assertion is elaborated upon at numerous points in the complaint and subsequent memoranda. The studies

reported on in Exhibit 6 address this assertion directly with a detailed analysis designed to determine whether OCS lessees have been able to reap abnormally high profits for their leaseholds under cash bonus bidding with 1/6 royalty.

22. These studies, unlike the plaintiffs' analyses, were based on a clear and correct concept of fair market value, reflecting both production revenues and exploration, development, and production costs. If the 1/16 royalty, cash bonus bid system were inherently flawed so as to prevent receipt of fair market value, then the portion of the value which the government failed to capture in bonuses and royalties would show up as surplus profits to lessees. The studies examined internal rates of return, a widely used indicator of the profit from investments. This measure is directly relevant to the receipt of fair market value by the government because any significant pattern of failure to receive fair market value will cause internal rates of return on OCS leases to increase to abnormal levels. Careful estimates were made of production revenues and costs, based on the actual drilling and production data for 1223 leases issued from 1954 through 1969. Internal rates of return for various categories of leases were calculated using these estimates and actual bonus and royalty payments. No pattern of abnormally high rates of return was evident in the estimates calculated in these studies. Rates of return in the range of 8 to 10% are clearly not exceptional. Thus these 1223 leases issued under the cash bonus, 1/6 royalty system do not demonstrate any inherent failure of that system to provide fair market value.

23. Plaintiffs misstate the paper's conclusion concerning one pattern that was evident, namely increases in the social rate of return on later leases. The conclusion did not address "company rates of return" as stated on page 21 of the second memorandum but "rates of return, absent bonus," which had been described in the preceding

paragraph of the paper as "society's rate of return" (U.S. Exhibit No. 6, p. 11). Society's return should, in fact, increase as the prices of oil and gas increase, because the resource is becoming more valuable. On the other hand, the company rates of return should not be higher on leases issued when oil and gas prices are higher if the bidding system is adequately capturing fair market value. The fact that "when bonus is considered, there is, if anything, a decline in the rate of return over time" to the company (U.S. Exhibit No. 6, p. 12) confirms that the cash bonus bid, 1/6 royalty system was performing properly in response to price increases and other changes during that period. Contrary to plaintiffs' assertion (footnote on p. 21 of the second memorandum), the paper contains no implication regarding performance after 1969, except that no "inherent weakness" in the cash bonus bid, 1/6 royalty system was evident. Mr. Donkin's calculation of the declining Federal share, as has been demonstrated above, is not relevant to the issue of fair market value because it fails to reflect the effects of costs on value.

24. Staff members of the Office of Policy Analysis, of which I am the Assistant Director, have carefully reviewed and followed the literature in the economic profession on the performance of bidding systems. To my knowledge, this rigorous test of the performance of the cash bonus bid, 1/6 royalty system has not been refuted by any analysis of similar detail and economic validity. On the other hand, a wide variety of both theoretical and empirical studies have shown that this system, while not perfect, does not exhibit the inherent weakness which plaintiffs assert. Improvement may be possible through cash bonus bidding with a fixed profit share as stated in U.S. Exhibit No. 6. However, a theoretical indication of possible improvement is a far cry from empirical proof of inherent weakness.

ANALYSIS OF EFFECTIVE FEDERAL SHARE IN OCS LEASE SALE NO. 48

25. Plaintiffs allege to have calculated that the government's effective share of oil and gas production value in leases receiving bids at OCS Lease Sale No. 48 will be 28.5%, second memorandum, p. 16. Not only does this calculation fail to take into consideration costs which may vary considerably according to the tracts (supra, ¶¶ 7-11), but it is based on the assumption that the average yield from OCS leases issued between 1954 and 1970 will be the average yield from leases awarded at OCS Lease Sale No. 48, second memorandum, p. 16, fn. 2. This assumption disregards the inherently risky nature of oil and gas exploration. More important, it ignores the fact that between 1954 and 1970 the United States issued leases in the most promising areas for oil and gas production, and we will be exceedingly lucky if the same quantities of oil and gas are discovered on leases issued after 1970. Throughout this litigation plaintiffs have relied on this false assumption that oil and gas can be expected to be discovered in the same quantities on leases issued before and after 1970, e.g. second memorandum, pp. 5, 8.

26. Plaintiffs' calculations (second memorandum, p. 16), in addition to being based on an invalid concept, are incorrect in several respects. Plaintiffs purport to calculate "present value" of resource production and royalties. They do not. They have merely calculated gross values in 1978 dollars ignoring the effect of the time value of those resources over the extended times and production, generally estimated at 20 years. At the standard 10% government discount rate used for calculating present value, the present value of OCS oil and gas production is about 39% of its gross value. This correction alone would require multiplying the plaintiffs' estimate of present value of production in line 4 and the present value of

royalties in line 5 by 0.39. With these corrections, the effective government share (line 9) becomes 47.0% rather than 28.5%.

27. Also, as plaintiffs admit, prices have increased. In evaluating Lease Sale No. 48 tracts, the Department of the Interior is using $21.59/barrel to reflect the effect of recent OPEC price increases on future oil prices. This is equivalent to $3.67/MMBtu. The net result, using plaintiffs' analysis (invalid though it is), is an effective government share of 35%. (Since the price expectation is in 1979 dollars, line 6 can be used instead of line 7.)

28. Of course the plaintffs' calculations are highly optimistic about the resource prospects for these tracts. It is just as reasonable to assume that the 1/6 royalty tracts in Lease Sale No. 10 will be only 75% or 50% as productive as tracts leased in the 1954-1970 period. These assumptions yield effective government shares of 41% and 53% respectively.

HIGH CONCENTRATION OF BIDDERS IN LEASE SALE NO. 48

27. In asserting that the resuts of Lease Sale No. 48 show that the major oil companies continue to dominate under a cash bonus, 1/6 royalty bidding system, plaintiffs cite certain statistics in a very misleading manner, second memorandum, p. 12. They state that the eight major oil companies "submitted the high cash-bonus bids on 75 percent of the tracts bid." However, this figure represents all high bids in which majors participated and fails to point out that many of these high bids were submitted by joint ventures which included one or more smaller companies. As stated by plaintiffs, the 75% figure appears to mean that only 25% of the high bids were submitted by non-majors. However, the results of Lease Sale No. 48 show that smaller, non-major companies participated in (or "submitted" in the plaintiffs' words) the

high cash-bonus bid on 67% of the tracts bid, see second memorandum, Appendix A, p. 2.

/s/ H. Theodore Heintz, Jr.
H. THEODORE HEINTZ, JR.
Assistant Director, Office of
Policy Analysis
U.S. Department of the Interior

Subscribed and sworn to before me, this 17th day of June 1979.

Notary Public

My commission expires (illegible).

IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE LANDS COMMISSION OF CALIFORNIA;
ENERGY ACTION;
THE CITY OF LONG BEACH, CALIFORNIA; ET AL.

v.

UNITED STATES, ET AL.

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

AFFIDAVIT OF GEORGE L. DONKIN

The affiant, GEORGE L. DONKIN, having been duly sworn, states as follows:

My name is George L. Donkin. I am the same George L. Donkin who prepared and submitted with this Court an Affidavit, with accompanying exhibit numbers 1-10, on June 20, 1979. A summary of my professional experience and qualifications is presented in Exhibit 1 to my June 20, 1979 Affidavit.

Exhibit 1 to this Affidavit summarizes my estimate of the Federal Government's effective share, including bonuses, of the total production value from OSC leases sold during the period 1975 through 1978 where the royalty payments to the government have been established on the basis of a fixed, one-sixth share of total production value. Exhibit 1 shows that, over the life of the one-sixth royalty leases sold during 1975-1978, total revenues received by the government—in discounted, constant 1978 dollars—will approximate 23.6 percent of the total production value attributable to those leases. This estimate is based upon the following assumptions:

- That the average oil and gas production yield per acre on one-sixth royalty leases sold during 1975-

1978 will equate to the average yield per acre associated with Gulf of Mexico OCS leases sold during 1954-1979 (i.e., .0101 Quadrillion Btu per acre); and

- That the average price, in discounted 1978 dollars, associated with production from fixed, one-sixth royalty leases sold during 1975-1978 will approximate $2.10 per million Btu.

The .0101 Quadrillion Btu per acre yield estimate is derived from Exhibits 2 and 3 of my June 20, 1979 Affidavit.

The average price assumption of $2.10 per million Btu, in discounted 1978 dollars, derives from the following current Department of Energy price forecasts:

- 1990 U.S. crude oil prices, in 1978 dollars, of $18.50 per barrel; this equates to $3.08 per million Btu, or $2.16 per million Btu in 1978 dollars at a 3.0 percent discount rate.
- 1985 new natural gas prices, in 1978 dollars, of $2.76 per 1000 cubic feet; this equates to $2.24 per million Btu in 1978 dollars at a 3.0 percent discount rate if an average heat content of 1000 Btu per cubic foot of gas is used.

The calculations presented in Exhibit 1 and in my June 20, 1979 Affidavit show a continuous decline, with respect to time, in the effective government share of total production values from fixed, one-sixth royalty leases sold during the period 1954 through 1978. The cause of this secular decline in the government's net effective share is the dramatic increases in oil and natural gas prices since 1973 and further price increases which are projected to occur in the future. These price increases result in a long-term diminution of the present value of lease bonuses, relative to total production values received by the oil and gas producing industry over the life of the fixed, one-sixth royalty leases.

With respect to leases where a large percentage of their ultimate production took place during the 1960's and early 1970's, the observed, net effective government share is much larger than that which will be realized on post-1970 leases. This is because a very large percentage of the production from post-1970 leases will be sold at substantially higher, deregulated world energy prices during the late 1970's and the years thereafter. This is demonstrated by my calculations showing that:

- Leases sold between 1954 and 1969 returned approximately 35 percent of their total production value to the United States, and the inclusion of the 1970 leases reduced the government's share for the period 1954-1970 to 34 percent.
- 1970 leases will yield only a 30 percent net government share.

  The 1971-1977 leases will yield only a 27 percent share if they ultimately produce an aggregate yield per acre equivalent to the yield on acreage leased from 1954 to 1970.
- The government's share for leases sold during the last four years (1975-1978) declines to 23.6 percent, again assuming a yield per acre equivalent to the yield on the earlier leases.

My overall conclusion is that, as a result of sharply escalating oil and natural gas prices in recent and future years, every year of leasing under the cash bonus and one-sixth royalty system has produced a diminishing effective return to the United States.

Exhibit 1 attached hereto.

I hereby declare under penalty of perjury that the foregoing statement is true and correct.

DATED this 27th day of June, 1979.

/s/ George L. Donkin
GEORGE L. DONKIN

EXHIBIT 1

Estimated Effective Government Share of Total Production Value From One-Sixth Royalty OCS Leases Sold During the Period 1975-1978 If Productivity Per Acre Equals Average Productivity Per Acre From OCS Leases Sold During the Period 1954-1970

	Acreage	Bonuses In $1000	Present Value of Bonuses In 1000's of 1978 Dollars
1975	1,679,877	$1,088,133	$1,422,256
1976	1,277,936	2,242,898	2,705,568
1977	930,074	1,558,581	1,724,143
1978	932,168	1,234,698	1,234,698
	4,820,055	$6,124,310	$7,086,655

Estimated Oil and Gas Production in Quadrillion Btu per Acre	.0101
Estimated Oil and Gas Production in Quadrillion Btu	48.7
Present Value of Oil and Gas Production in 1000's of 1978 Dollars at Deflated 1978 Price of $2.10 per MMBtu	$102,270,000
Present Value of Royalties @ One-Sixth of Production Value	$17,045,000
Present Value of Government Share (Royalties Plus Bonuses)	$24,131,665
Government Share As a Percent of Total Production Value	23.6%

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1633

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, SECRETARY OF INTERIOR, ET AL., DEFENDANTS

MEMORANDUM AND ORDER

This Court has considered Plaintiffs' Motion for a Preliminary Injunction, the Opposition thereto, the oral arguments of Counsel and the entire record herein. Plaintiffs have failed to make the requisite showing which would justify this Court's granting their request for preliminary injunctive relief. *See WMATA* v. *Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association* v. *F.P.C.*, 259 F.2d 921 (D.C. Cir. 1958). In particular, Plaintiffs have not shown a likelihood of success on the merits.

The Outer Continental Shelf Lands Act requires that the cash bonus-fixed royalty bidding system provided for in 43 U.S.C. § 1337(a)(1)(A) be applied to 40-80% of the acreage offered for leasing, while other alternative bidding systems listed in 43 U.S.C. § 1337(a)(1) be applied to 20-60% of the acreage. 43 U.S.C. § 1337(a)(5)(B). The legislative history of the Act clearly reveals that the Secretary *shall* utilize the alternative bidding system so as "to assure that adequate information is obtained as to relative advantages and disadvantages of the various bidding systems . . . ." House Conference Report No. 95-1474, 95th Cong., 2d Sess. 92 (1978), *reprinted in* [1978] U.S. Cong. & Ad. News 1674, 1691. Only two of the alternative bidding systems (other than the cash bonus-fixed royalty bidding system) have been

employed since the 1978 Amendments to the Outer Continental Shelf Lands Act were enacted. However, the nine month delay in promulgating regulations designed to implement the other alternative bidding systems,[1] although lengthy, is not arbitrary and capricious in light of the complexity and sensitivity involved in preparation of such regulations. *See* H.R. Rep. No. 95-1835, 95th Cong., 2d Sess. 25 (1979).

Moreover, Plaintiffs have failed to show that utilization of the cash bonus-fixed bidding system with a 16⅔% fixed royalty violates the purposes underlying the Act, set forth at 43 U.S.C. § 1802. *See* H. Heintz, Jr., Patterns of Bidding, Rates or Return and Ownership for OCS Oil and Gas Leases (Dec. 15, 1978) (Defendants' Exhibit No. 6); U.S. Dept. of Energy, Report to Congress on Various Bidding Options Utilized in FY-78 Lease Sales on the Outer Continental Shelf (Defendants' Exhibit No. 7).

Finally, this Court notes that the 1978 Amendments provide a scheme of Congressional oversight with respect to the use of various bidding options. *See, e.g.*, 43 U.S.C. §§ 1337(a)(8), (9). The Congressional safe-guards serve to protect the public interest.

For the reasons discussed above, it is by the Court this 27th day of June, 1979,

ORDERED, that Plaintiffs' Motion for a Preliminary Injunction is hereby DENIED.

/s/ Aubrey E. Robinson, Jr.
United States District Judge
AUBREY E. ROBINSON, JR.

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[1] Promulgation of regulations implementing a bidding system is a prerequisite to employment of that system. 43 U.S.C. § 1337(a)(1).

REPORT TO THE CONGRESS

BY THE COMPTROLLER GENERAL OF THE UNITED STATES

[SEAL]

OUTER CONTINENTAL SHELF SALE 40—INADEQUATE DATA USED TO SELECT AND EVALUATE LANDS TO LEASE

Department of the Interior

The Interior Department selected Outer Continental Shelf oil and gas tracts for leasing without obtaining enough information to determine their potential resources. Similar problems were discussed in GAO's report on Outer Continental Shelf Sale 35.

Overall, industry bidding was greater in Sale 40 than Sale 35. The larger amount of money bid in Sale 40, however, gives no assurance that the best areas were offered or that energy resources will be found.

Interior should direct an exploration program to develop and implement a plan for appraising Outer Continental Shelf Oil and gas resources.

* * * * *

DIGEST

More and more the Nation is relying on the Outer Continental Shelf leasing program as a way to increase our domestic oil and natural gas production. Decisions on where to lease and at what rate will greatly affect whether the Nation can decrease its reliance on foreign energy supplies and have enough energy resources to meet near-term needs.

The Department of Interior's policy of leasing Outer Continental Shelf lands that have not been properly evaluated (because of insufficient data) encourages industry to speculate in lands believed to contain no or minimal resources and does not guarantee that the Government receives the fair market value for these leased resources.

To prevent this, the leasing program should be designed to offer the best acreage after it has been adequately explored for resources.

In Sale 40, held on August 17, 1976, 154 oil and gas tracts were offered for lease off the coast of Delaware, Maryland, and New Jersey (called the Baltimore Canyon). The tracts were offered to the highest industry bidders, who are required to develop tracts for oil and gas. The bonus revenues received from the leased tracts were about $1.1 *billion.* (Bonus revenues are initial payments at time of lease, apart from the percent of production payments the Government later receives.)

SELECTING AND EVALUATING TRACTS

Interior selected tracts for lease after reviewing limited and insufficient data and before assessing the true resource developmental potential of the land. (See pp. 12 and 20.)

Before actual sale, each tract is assigned an evaluation of its worth to determine the acceptability of industry bids and to help assure the Government receives a fair market value return for the lease of public resources.

As with Sale 35, Sale 40 evaluations were unreliable—made without enough data. Interior had less overall information to use in evaluating Sale 40 than it did for Sale 35. (See p. 22.)

INDUSTRY BONUS BIDDING

The best measure of a sale's success is not the total bonus dollars received from holding a sale but the ultimate discovery and production of oil and natural gas.

For example, the total bonus revenues received from Sale 32 in 1973 were about $1.5 *billion,* but resources have not yet been found. The resource potential of the Sale 32 area is questionable. Getting more geologic knowledge before a sale may reduce industry's willingness to pay

high bonuses, but it will provide better knowledge of the resource potential and aid in selecting areas to be leased.

AGENCY COMMENTS

Because of the need to issue the report before passage of pending Outer Continental Shelf legislation, the Department was unable to formally comment in writing within the given timeframe. GAO did, however, discuss the report's recommendations with Department officials. These officials told GAO that the Department's views on the recommendations in the Sale 35 report as stated in the June 13, 1977, letter from the Under Secretary of the Interior to Chairman Ribicoff, Senate Committee on Government Operations could be considered representative of their views on GAO's recommendations in this report. (See app. V.)

RECOMMENDATIONS TO THE SECRETARY OF THE INTERIOR

The Secretary of the Interior should direct a geological exploration program which has a systematic plan for appraising Outer Continental Shelf oil and gas resources, including selected stratigraphic test drilling. The plan should identify the level of stratigraphic drilling necessary to provide a minimal level of data on major shelf areas.

After the plan has been developed, the Secretary should encourage private industry to explore areas identified in the plan and confidentially share with Interior the information developed. Exploration permits issued by the Department for private drilling should provide the opportunity for any bonafide potential bidders to "buy-in" on the exploration by equally sharing the cost of the drilling.

After Interior knows what land industry has explored and how thoroughly it was explored, if any data is still needed, the Department of the Interior should take nec-

essary actions, including public financing of stratigraphic drilling, to obtain it.

In addition, after the tracts have been selected the process outlined above should be repeated to obtain more reliable data for prelease evaluation purposes if deemed necessary.

Interior's Geological Survey and Bureau of Land Management should be required to consider all necessary information and to make final corrections to tract values before lease. Then, the Department should offer for lease only those areas for which it has collected and analyzed sufficient information to adequately identify where the resources are, their estimated value, and potential for development in the near future.

* * * * *

Major oil companies (companies with average daily production of crude oil, natural gas, or liquefied petroleum products exceeding 1.6 million barrels worldwide) were prohibited in Sale 40 from joint bidding with each other. Nine oil companies met this criteria for Sale 40 and were classified as majors. These companies, however, are not prevented from joint bidding with non-major oil companies.

An analysis of the bidding results for the 13 higher royalty tracts leased showed that the 5 major companies which successfully bid retained about a 55 percent interest.[1] The remaining 45 percent interest in these tracts was split among the 20 other successful bidders. In comparison, the majors retained about a 45 percent interest in the 1/6 royalty rate tracts.

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[1] It should be noted that this percentage will vary depending on the definition of a major oil company. For Sale 40, the majors were (1) Amoco Production Company, (2) BP Alaskan Exploration, Inc., (3) Chevron Oil Company, (4) Exxon Corporation, (5) Gulf Oil Corporation, (6) Mobil Oil Corporation, (7) Shell Oil Company, (8) Standard Oil Company of California, and (9) Texaco, Inc. Other large companies not considered a major for this sale successfully bid on these tracts.

COMPETITION IN SALE 40

The competition in Sale 40 was greater than in Sale 35, however, there was still a significant proportion of one and two bid tracts as the following table shows.

	Total tracts receiving bids		High royalty rate tracts	
Number of bids on each tract	Number of tracts	Percentage	Number of tracts	Percentage
1	28	27.7	—	—
2	21	20.8	1	6.7
3	7	6.9	—	—
4	5	5.0	—	—
5	4	4.0	1	6.7
6	5	5.0	2	13.2
7	8	7.9	1	6.7
8	15	14.8	7	46.7
9	7	6.9	3	20.0
10	1	1.0	—	—
Total	101	100.0	15	100.0

Seventy percent of the tracts in Sale 35 receiving bids got only one or two bids. For Sale 40, about 49 percent of the tracts bid on got one or two bids. Other factors also show increased competition for Sale 40 over sale 35 as follows:

—a much larger percentage of tracts offered in Sale 40 were bid on than in Sale 35 (66 and 30 percent respectively), and

—the average number of bids for each tract was much greater for Sale 40 than Sale 35 (an average of 4.1 bids and 2.4 bids for each tract respectively).

We continue to believe, however, that the high percentage of one and two bid tracts in Sale 40 still indicates inadequacies in sale competition. As stated in our Sale 35 report, a competitive leasing program is based on the

premise that competition will provide a fair market value. When competitive conditions do not exist, however, it becomes increasingly important to have reliable tract values to use as the basis for accepting or rejecting bids. When large percentages of the total tracts in a sale receive one or two bids per tract or are minimally valued, speculation can be a strong incentive.

We also analyzed the distribution of bids for one and two bid tracts. We found that 42 of the 49 tracts were leased and 41 were minimally valued by Survey at $25 an acre. The other seven tracts were not leased and were valued above minimum. The following table shows that many of the bids were very close to the minimum value. Thirty of the 58 bids were under $60 an acre (20 of these 30 bids were under $38 an acre). Overall, the average high bid for these 42 tracts was about $340 an acre. The average high bid for all other tracts leased (tracts with three or more bids) was more than 10 times greater—$3,605 an acre. We believe these statistics indicate that speculation was a strong motivating force in bidding in many of these tracts. Although Sale 40 did generate better competition than Sale 35, we continue to believe that greater competition on the OCS is needed.

BY THE COMPTROLLER GENERAL
REPORT TO THE CONGRESS
OF THE UNITED STATES

Lower Cook Inlet—Another Example of More Data Needed for Appraising Outer Continental Shelf Oil and Gas Resources

The Chairman, House Ad Hoc Select Committee on the Outer Continental Shelf, requested GAO to review the Lower Cook Inlet oil and gas lease sale held October 27, 1977, in Anchorage, Alaska.

The Department of the Interior selected and evaluated Outer Continental Shelf oil and gas tracts for leasing without obtaining enough information to determine their potential resources.

Interior should direct an exploration program which has a systematic plan for appraising Outer Continental Shelf oil and gas resources including selected stratigraphic test drilling.

[SEAL]

* * * * *

About 60 percent of the tracts in Sale CI receiving bids got only one or two bids. For Sale 35 and Sale 40 respectively, about 70 percent and 49 percent of the tracts bid on got one or two bids.

Other facts regarding the relative competitiveness of these sales are:

—A larger percentage of tracts in Sale CI were bid on than in either Sale 35 or Sale 40 (67 percent of the tracts were bid on in Sale CI, 66 percent for Sale 40, and 30 percent for Sale 35). (See table on p. 4.)

—The average number of bids for each tract in Sale CI was greater than Sale 35 but less than Sale 40 (an average of 2.6 bids per tract for Sale CI, 4.1 bids per tract for Sale 40, and 2.4 bids per tract for Sale 35).

The high percentage of one and two bid tracts in Sale CI is, to us, the primary indicator of inadequate sale competition. As stated in our Sale 35 and Sale 40 reports, a competitive leasing program is based on the premise that competition will provide a fair market value return. When competitive conditions do not exist, however, it becomes increasingly important to have reliable tract values to use as the basis for accepting or rejecting bids. When large percentages of the total tracts in a sale receive one or two bids per tract and are minimally valued based on poor information, there can be no assurance that the public received a fair market value return for the potential resources leased.

We also analyzed the distribution of bids for one and two bid tracts in Sale CI. We found that 52 of the 55 tracts receiving one or two bids were leased. Fifty of these leased tracts were minimally valued by Survey at $25 per acre under the cash bonus bidding system or $25 per acre fixed bonus with less than a 16⅔ percent royalty rate under the royalty bidding system. The remaining five tracts were valued above the minimums. Of these five, two were leased and three were not leased due to bid insufficiency."

The following table shows that many of the leased tracts receiving one or two bids under the cash bonus system (royalty bid tracts are excluded) were valued by industry close to Survey's minimum. Thirty-two of the 54 industry bids (about 59 percent) were under $61 an acre (23 of the 54 one or two bids were under $41 per acre). The average high bid for all 38 tracts leased under the cash bonus system receiving one or two bids was $489 per acre. The average

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The results of the uncertainty of the potential value of tracts may cause industry to tie up capital in lands with minimum or no resource potential or buy very good lands

for less than fair market value. Until these tracts are further explored and potential resources are developed, no one knows whether the capital sunk into these tracts was excessive or, conversely, will provide a sizeable return for the investment.

CONCLUSIONS

Our review of the Sale CI indicates, as it did for Sale 35 and Sale 40, that the Department had limited data with which to value tracts. We believe this for the following reasons:

—There was less overall information for Sale CI than Sale 35 but more than Sale 40. There was only one deep stratigraphic test off-structure for Sale CI.

—The reliability rating of the tracts in Sale CI was "D," which is the same as the Sale 35 "D" rating and basically equivalent to the "E" rating in Sale 40. The ratings show that, at best, only one of the three parameters necessary for resource evaluation could be identified (structures) by seismic data.

—The competition in Sale CI was better than in Sale 35 but less than Sale 40. There were still a significant number of tracts (60 percent) getting one or two bids each in Sale CI, as compared with 70 percent for Sale 35 and 49 percent for Sale 40. In these kinds of non-competitive situations, where bidding is not heavy, it is important for Survey to have the best possible geological and geophysical information to protect the public interest.

—The differences in values assigned by Survey and by industry to the minimum value tracts leased differed by an average of more than 1,900 percent for the tracts offered under the bonus bid system.

RESPONDENTS REPLY MEMO IN THE DISTRICT COURT, DATED JULY 14, 1980

* * * * *

1. *Public Returns-Producer Plaintiffs*

The first major injury resulting from defendants' course of conduct addressed in the Complaint is the reduction of public revenues, and the corresponding increase in profit to the oil companies as lessors, which is caused by continued 16⅔% royalty leasing and by the failure to implement variable profit share leasing as a means of maximizing public returns (see p. 11, n. 7, *supra*). The California plaintiffs in this case (the State Lands Commission and the City of Long Beach) are lessors and producers of oil in competition with the United States, which leases oil on properties on the Outer Continental Shelf including various West Coast locations.[8] These producer-plaintiffs suffer concrete and tangible injury from defendants' failure to implement leasing systems that would improve the public returns from OCS leasing and reduce the returns for lessees. As set forth in paragraph 132 of the Complaint, California plaintiffs are now uncertain of their future offshore leasing capacity, of production on their own existing leases, and of future profits on those leases. This is because California has leased, and intends to continue to lease, its offshore oil lands under profit share arrangements yielding the State nearly a 50% share of revenues from the oil and gas recovered (see Complaint, ¶¶ 71-72), wehreas the United States is continuing to lease on the basis of a 16⅔% royalty which, even with cash bonuses included, represents a net federal share of less than 30%. See Affidavit of George L. Donkin, sub-

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[8] The 1978 Amendments were specifically intended to take the interests of coastal states into account, in contrast to earlier years where the interests of the oil companies had clearly been predominant. *See, e.g.*, H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 54 (1977).

mitted at July 17, 1979 hearing. Clearly, oil companies will be disinclined to continue to bid high profit shares for California leases or to produce on the existing leases, and will be unwilling or unable to provide revenue to California at equivalent rates of profit if the Federal Government continues to make available enormous quantities of oil on which the producer retains not 50% of production but 70% and more. Indeed, the truth of this proposition has recently been conceded by the Government's chief economist Heintz, in answer to questions concerning the effect of possible differences in offshore oil royalty obligations:

> "Q Let's say you established a system that produced a 5 percent profit, was expected to produce a 5 percent return on investment for oil companies and England had a system that produced a 20 percent return. Do you think that—
> A I think we would expect to see a decline in participation of firms who have opportunities in England in the United States OCS program.
> Q Why is that?
> A *Any rational businessman with a choice between some investments that yield 20 percent and some that yield 5 percent will always choose the 20 percent . . . .*" (Exhibit 9) (emphasis added).[9]

Moreover, apart from these manifest injuries to California producer-plaintiffs when the Federal Government leases OCS property on terms yielding far smaller returns to the public and thus greater returns to the companies, there is also direct monetary injury to the California plaintiffs in "drainage" situations. Drainage sites place California in the role of a co-participant with the United States in royalties received from pumping at the

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[9] It is well-established that "private competitive injury" is a sufficient basis for standing. Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 223 (1974); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970).

Federal end of an offshore reservoir where the State is a part owner of the terrain (43 U.S.C. § 1337(g)). Thus, on Lease Sale 48 last June, the United States negotiated with the State for an agreement for such joint participation in the royalty returns received from the companies. Clearly, the State is being financially injured under these circumstances by the fact that the Federal leases are let on the basis of an unduly low royalty rate and without recourse to use of new systems that would maximize the public return from leasing both to the Federal treasury and to the State treasury under a drainage agreement.

* * * * *

APPENDIX B

RESPONDENTS' REPLY MEMO OF JULY 14, 1980

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.

v.

CECIL D. ANDRUS, ET AL.

DISTRICT OF COLUMBIA)
) ss
CITY OF WASHINGTON)

AFFIDAVIT OF GEORGE L. DONKIN

The affiant, GEORGE L. DONKIN, having been duly sworn, states as follows:

My name is George L. Donkin. I am the same George L. Donkin who prepared and submitted with this Court a number of Affidavits during the spring and summer of 1979. A summary of my professional experience and qualifications is presented in Appendix A to this Affidavit.

The 1978 amendments to the Outer Continental Shelf Lands Act mandate that "[l]easing activity shall be conducted to assure receipt of fair market value" for the petroleum and natural gas resources found and produced at OCS leases in the federal domain (Section 18(a)(4). At that time, Congress expressly authorized recourse to several diverse leasing systems, including profit-sharing. These diverse leasing systems were to be used as alternatives to the variable cash-bonus, fixed one-sixth royalty bidding systems which have been used by the Department of Interior in nearly all federal OCS lease sales since 1954. Congress also reaffirmed that any federal leasing

system must promote competition and a hieve rapid development of oil resources on the OCS.

In my view, with world petroleum markets as unsettled as they have been in recent years, the variable cash-bonus, fixed one-sixth royalty bidding system cannot possibly assure that the government obtains fair value for the oil and gas resources located at OCS leases in the federal domain. Indeed, if unanticipated world oil or natural gas price increases occur, as has been the experience throughout the 1970's, the variable cash-bonus, fixed royalty leasing system virtually guarantees that the government will obtain less than fair value for its hydrocarbons resources in the offshore federal domain.

In June 20, 1979 affidavit, I presented the following estimates of the government's effective share of production value from OCS leases in the Gulf of Mexico sold during the period 1954-1970 (see Exhibit 4 of June 20, 1979 Affidavit):

(1) 21.2 percent of total production value, in nominal dollars;

(2) 27.8 percent of total production value, in constant dollars; and

(3) 34.0 percent of total production value, in constant 1978 dollars and discounted to reflect the time value of money.

Similarly, in my June 27, 1979 Affidavit, I showed that the effective government share of total production value for OCS leases sold during the period 1975-1978 will be substantially less (i.e., only 23.6 percent) than that associated with leases sold prior to 1971. Indeed, I concluded in my June 27, 1979 Affidavit that "as a result of sharply escalating oil and natural gas prices in recent and future years, every year of leasing under the cash bonus and one-sixth royalty system has produced a diminishing effective return to the United States."

The effective government share of total production value for OCS leases has exceeded the fixed 16⅔ royalty rate because the government has attempted to obtain fair value in the up-front cash bonuses offered by the oil and gas companies bidding on these properties. This historical practice of requiring a combination of cash bonus and one-sixth royalties is clear evidence that 16⅔ percent of the production value is less than the fair value of OCS leases in the federal domain. Otherwise, the government would have been willing to accept cash bonus bids of zero dollars and oil and gas companies would not have been willing to bid more than the one-sixth royalty rate on OCS leases sold since 1954. It follows, therefore, that 16⅔ percent of production value is less than the fair value of oil and gas resources located at OCS leases in the federal domain.

When it is recognized that a fixed one-sixth royalty rate is less than fair value, it becomes clear that the cash-bonus, 16⅔ percent royalty bidding system cannot possibly assure fair value. This is because the government's share of any windfall gains resulting from dramatic and unexpected increases in oil and gas prices remains limited to the fixed, one-sixth royalty rate which, as was shown above, represents less than fair value. It was precisely for this reason that former Secretary of the Interior Morton stated in 1975 that any bidding system must "insure receipt of fair farket value" and "we really don't get true value if, at the time the bonus is paid, oil is selling for $5 and then it goes up to $10. The 16⅔% royalty is not high enough" (VC 99).

Unfortunately, the increase in oil prices from $5 to $10 per barrel referred to by Secretary Morton seems insignificant in comparison with more recent trends in domestic crude oil prices. This is shown in Exhibit 1 to this Affidavit. For example:

(1) The average price of domestic crude oil has risen from $7.67 in 1955 to $19.36 in March of this year; and

(2) Newly discovered U.S. crude now sells for about $30 per barrel, which is approximately 2.5 times what was obtainable for new crude in 1975 and about 670 percent greater than pre-embargo prices of $3.89 per barrel.

Similar price increases have occurred in the natural gas industry. To illustrate, as shown in Exhibit 2 of this Affidavit:

(1) Between 1955 and 1972, average gas prices in the U.S. were relatively stable (the compound average annual growth rate over this period was only 3.5 percent);

(2) Average domestic wellhead prices for natural gas increased nearly 600 percent from 18.6 cents in 1972 to $1.20 in December of 1979; and

(3) The average wellhead price paid by interstate pipelines nearly tripled from 47.9 cents in 1976 to $1.42 per thousand cubic feet (Mcf) in February of this year.

The natural gas price data presented in Exhibit 2 are average prices. That is to say, they represent the mean prices of the combination of low-cost, old contracts and much more expensive, new gas contract prices. New gas prices have increased even more dramatically during the 1970's.

For example, in 1971, the Federal Power Commission (now the Federal Energy Regulatory Commission) increased the ceiling price for new contracts covering gas sales from offshore Louisiana OCS leases from 18.5 cents to 26 cents per Mcf. By April of this year, the maximum lawful price permitted under the Natural Gas Policy Act of 1978 for newly discovered gas had risen to $2.43 per Mcf. This represents an increase in the wellhead price for new OCS gas of approximately 835 percent over that 9-year period.

It must also be recognized that the dramatic wellhead price increases summarized in Exhibits 1 and 2 were totally unforeseen by petroleum experts both within the industry itself and in the federal government. For example, when the oil and gas companies submitted their bids on OCS leases during the early 1970's, their cash bonuses were typically developed and evaluated by the Interior Department on the basis of wellhead prices of 26 cents to 45 cents per Mcf for gas and $3.50 to $4.00 per barrel for oil. At that time, no analyst of petroleum and natural gas price trends was able to contemplate, much less believe, that by 1980 new oil would be selling for $30 per barrel or that the federal government would permit new gas prices of approximately $2.40 per Mcf.

Of equal importance, more recent estimates of future oil and gas prices have consistently understated the extent of price increases actually experienced. For example:

(1) As shown in Exhibit 3, the Department of Energy's 1977 forecast of domestic wellhead oil prices in 1985 have already been greatly exceeded for various types of decontrolled crude oil (i.e., newly discovered oil sold in March of this year received $8.16 per barrel more than was estimated in 1977 as the average domestic new oil price in 1985; recent stripper oil prices of $36 per barrel, as opposed to the 1977 estimates of $21.74 for stripper oil in 1985); and

(2) Doe has significantly increased its estimates of 1985, 1990 and 1995 world oil prices in each of the past two years. This is shown in Exhibit 4, which contains a summary of the official DOE world oil price estimates from the 1977, 1978 and 1979 Annual Reports to Congress. As shown there, DOE has more than doubled its estimates of 1985 and 1990 world oil prices during the last two years and increased its 1995 estimate by $15.50—$22 per barrel since last year.

The comparisons of recent DOE oil price forecasts are presented in constant 1979 dollars. That is to say, the effects of future inflation on the price of oil are not taken into account. In its 1978 Annual Report to Congress, DOE also projected future world oil prices in current (i.e., nominal) dollars for the period 1979 through 1995. These projections are summarized below:

Projected World Oil Prices
In Current Dollars/Barrel

Year	Low	Mid Range	High
1979	16.00	16.00	16.00
1985	22.50	22.50	33.00
1990	28.50	35.50	45.50
1995	40.50	58.00	76.00

As was previously shown in Exhibit 1, actual 1979 wellhead prices for decontrolled, domestic crude oil were well above the prices forecasted by DOE only one year earlier. Similarly, the average refiner acquisition cost of crude oil imports last year was $21.67 per barrel, and by March of this year, U.S. refiners were paying $33.42 per barrel for imported crude oil (DOE, Energy Information Administration, *Monthly Energy Review, June 1980*, page 70). Thus, world oil prices in current dollars today have greatly exceeded recent forecasts and they are alread approaching DOE's outdated 1978 projections for 1990.

The fact that the U.S. government has consistenly underestimated oil price increases and has made substantial upward revisions to its future oil price forecasts in each of the last two years is clear evidence that the oil prices used to evaluate cash-bonus bids for federal leases throughout the 1970's were too low, relative to what will ultimately be realized by the oil companies to whom the leases were awarded. This, in turn, means that fair value

was not received by the government for the OCS oil and gas leases issued during this period.

To further illustrate why the cash-bonus, fixed one-sixth royalty bidding system cannot assure the government fair value for OCS resources, consider Exhibit 1 to my Affidavit of June 27, 1979. When that exhibit was prepared last year, I used the then current DOE estimates for world oil prices over the period 1985-1995. These were:

New Crude Oil Prices

	Per Barrel In 1978 Dollars	Per MMBtu In 1978 Dollars	Per MMBtu In Discounted 1978 Dollars
1980	$14.00	$2.33	$2.20
1985	15.09	2.52	2.05
1990	18.83	3.14	2.20
1995	23.83	3.97	2.40

Events in both world and domestic oil markets since last summer have shown that these oil prices are unrealistically low. Indeed, based upon current DOE price data and forecasts, the following oil prices would be appropriate for purposes of estimating the effective government share of total production value from one-sixth royalty OCS leases sold during the period 1975-1978.

Estimated New Crude Oil Prices

	Per Barrel In 1979 Dollars	Per Barrel In 1978 Dollars	Per MMBtu In 1978 Dollars	Per MMBtu In Discounted 1978 Dollars
1980	$28.90	$26.66	$4.44	$4.19
1985	32.00	29.52	4.92	4.00
1990	37.00	34.14	5.69	3.99
1995	41.00	37.83	6.30	3.81
Average	$34.73	$32.04	$5.34	$4.00

Source: DOE, Energy Information Administration, *Analysis Report, Midterm Energy Supply and Demand 1985-1995*, page 4 (June 1980).

The average discounted 1978 dollar price for new oil of $4 per MMBtu for the period 1980-1995 is nearly double that which I used last year ($2.10 per MMBtu) in preparing my June 27, 1979 Affidavit. If it is assumed that one-half the hydrocarbon resources to be produced from the OCS leases sold during the years 1975-1978 are crude oil, then $3.05 per MMBtu ($4.00 + $2.10/2) is the appropriate discounted, constant 1978 dollar price to assign to the 48.7 quadrillion Btu resource estimate shown in Exhibit 1 to my June 27, 1979 Affidavit. As shown in Exhibit 5 to this Affidavit, the modification of my earlier exhibit to reflect more current oil prices and oil price forecasts results in an estimated government share of 21.4 percent for the 1975-1978 cash-bonus, fixed royalty leases, as opposed to the 23. 6 percent estimate contained in my earlier exhibit. Similar downward revisions should be made to each of my previous calculations of the government's effective share of the total production value from OCS leases sold during the 1970's.

I have prepared Exhibit 6 to further illustrate and quantify why a cash-bonus, fixed royalty bidding system cannot possibly assure the government fair value for its OCS resources. The data contained in column (1) of this exhibit are taken from Exhibit 1 of my June 27, 1979 Affidavit. That exhibit showed that the effective government share of future production value from cash-bonus, fixed royalty leases sold during the period 1975-1978 will approximate 23.6 percent. This estimate was calculated on the basis of a constant 1978 dollar price of $2.10 per MMBtu for the oil and gas resources to be produced at that acreage. This estimated price was derived from the then current DOE oil price forecasts through 1995. As shown at Line 12 of this Affidavit, given the bonuses paid and the estimated quantity of oil and gas resources at this acreage, the oil and gas industry would net $78.1 billion, exclusive of royalties and bonuses, at discounted 1978 dollar prices of $2.10 per MMBtu.

Column (2) of this exhibit was prepared in recognition of the more current DOE world oil prices previously discussed. There it is shown that at discounted, 1978 dollar prices of $3.05 per MMBtu, $45.6 million in bonuses would be required if the present value to the oil and gas companies of future production, net of bonuses and royalties, is to remain at $78.1 billion. Thus, this exhibit shows that the dramatic and unexpected increases in world oil prices experienced during the past fifteen months and the new recognized prospects for further price increases in the future will result in a windfall of approximately $38.5 billion for the oil and gas industry. Stated differently:

(1) With world oil prices ranging between $12 and $15 per barrel when this acreage was acquired;

(2) with only moderate increases in world oil prices being anticipated at that time;

(3) with no one anticipating that nominal oil prices would rise to $51 in 1985, $81 in 1990 and $117 in 1995;

(4) the present value of the cash banuses paid was approximately $38.5 billion too low, in view of the significantly higher prices which will ultimately be obtained for all future oil production from these leases.

I have prepared Exhibit 7 to show the approximate magnitude of government revenues foregone if the cash-bonus, fixed royalty bidding system is associated with 70 percent of the undiscovered offshore oil and gas resources to be produced between now and the end of this century and if that bidding system results in reductions below fair value of the effective government share of future OCS oil and gas revenues of 5.0 percent and 10.0 percent, respectively. As shown there, these estimates indicate that the government could forego revenues ranging between:

(1) $6.8 and $32.4 billion if the government's share is 5.0 percent too low;

(2) $13.7 and $64.7 billion if the government's share is 10.0 percent too low; and

(3) $19.6 and $39.2 billion if the mid-points of the USGS resource estimates are used.

As shown in Exhibit 7, the size of the revenues at stake in the choice of bidding systems for OCS acreage is substantial. Indeed, if the mid-range resource estimates are used then the amount by which the government receives less than fair value between 1980 and 2000 could easily exceed the total bonuses paid for all OCS leases sold between 1954 and 1977 of $19.0 billion.

Lastly, in my view, the cash-bonus, fixed royalty bidding system constitutes a substantial barrier to independent entry into OCS oil and gas producing operations. Thus, the cash-bonus, fixed royalty bidding system will stifle competition rather than promote competition as is required by the 1978 amendments to the Act. This is because the large upfront bonus payments required simply to obtain the rights to explore for hydrocarbons on federal leases tend to discourage independent wildcatters from participating in offshore exploration and development. As a result, independent wildcatters have concentrated their efforts in onshore producing provinces and left the OCS primarily to major integrated petroleum companies and the producing affiliates of interstate gas pipelines.

If significantly more active participation in offshore operations by independent wildcatters could be induced, I believe that ultimate oil and gas production from the OCS will be enhanced. This is because a greater number of diverse participants in offshore exploration activities will result in increased exploratory drilling taking place (and perhaps at an increased rate, with respect to time) as

many potential prospects are drilled which otherwise would be ignored by a smaller number of explorers.

Exhibits 1 through 7 attached hereto.

DATED this 14th day of July, 1980

/s/ George L. Donkin
GEORGE L. DONKIN

DISTRICT OF COLUMBIA)
) ss
CITY OF WASHINGTON)

Subscribed, sworn to and acknowledged before me, a Notary Public in and for the State and City aforesaid, by George L. Donkin, on this 14th day of July, 1980

/s/ AMERICA G. WEAR
America G. Wear
Notary Public
State of Virginia
At Large

My Commission Expires
November 15, 1981

Exhibit 1

Domestic Crude Oil Wellhead Prices 1955-1980

Dollars Per Barrel

		Lower Tier	Upper Tier	Stripper	Alaskan North Slope	Naval Petroleum Reserve	Newly Discovered Etc.	Actual Domestic Average
1955	AVERAGE	NA	NA	NA	NA	NA	NA	2.77
1956	AVERAGE	NA	NA	NA	NA	NA	NA	2.79
1957	AVERAGE	NA	NA	NA	NA	NA	NA	3.09
1958	AVERAGE	NA	NA	NA	NA	NA	NA	3.01
1959	AVERAGE	NA	NA	NA	NA	NA	NA	2.90
1960	AVERAGE	NA	NA	NA	NA	NA	NA	2.88
1961	AVERAGE	NA	NA	NA	NA	NA	NA	2.89
1962	AVERAGE	NA	NA	NA	NA	NA	NA	2.90
1963	AVERAGE	NA	NA	NA	NA	NA	NA	2.89
1964	AVERAGE	NA	NA	NA	NA	NA	NA	2.88
1965	AVERAGE	NA	NA	NA	NA	NA	NA	2.86
1966	AVERAGE	NA	NA	NA	NA	NA	NA	2.88
1967	AVERAGE	NA	NA	NA	NA	NA	NA	2.92
1968	AVERAGE	NA	NA	NA	NA	NA	NA	2.94
1969	AVERAGE	NA	NA	NA	NA	NA	NA	3.09
1970	AVERAGE	NA	NA	NA	NA	NA	NA	3.18
1971	AVERAGE	NA	NA	NA	NA	NA	NA	3.39
1972	AVERAGE	NA	NA	NA	NA	NA	NA	3.89
1973	AVERAGE	NA	NA	NA				
1974	AVERAGE	5.03	10.13	NA	NA	NA	NA	6.87

1975	AVERAGE	5.03	12.03	NA	NA	NA	NA	7.67
1976	AVERAGE	5.13	11.71	12.16	NA	NA	NA	8.19
1977	AVERAGE	5.19	10.72	13.59	6.35	13.34	NA	8.57
1978	AVERAGE	5.46	12.15	13.95	5.22	12.85	NA	9.00
1979	January	5.75	12.66	14.55	5.79	13.10	NA	9.46
	February	5.76	12.78	14.88	5.87	13.94	NA	9.69
	March	5.82	12.84	14.88	6.66	13.97	NA	9.83
	April	5.85	12.94	16.71	7.45	14.56	NA	10.33
	May	5.91	13.02	17.53	8.47	15.85	NA	10.71
	June	6.07	13.14	20.24	8.97	16.02	15.23	11.70
	July	6.00	12.79	24.76	13.35	20.13	26.88	13.39
	August	6.09	13.33	25.71	14.14	20.77	20.63	14.00
	September	6.09	13.53	27.09	13.09	20.85	19.55	14.57
	October	6.12	13.56	29.42	13.12	21.01	20.42	15.11
	November	6.09	13.68	30.64	13.48	26.48	22.15	15.52
	December	6.21	13.76	34.99	13.60	29.04	25.40	17.03
	AVERAGE	5.95	13.20	22.93	10.57	19.40	21.66	12.64
1980	January	6.23	13.82	35.92	13.77	28.94	28.28	17.85
	February	6.37	14.03	36.14	13.77	34.96	29.25	18.81
	March	6.35	13.99	36.33	13.77	34.67	30.06	19.36
	AVERAGE	6.32	13.96	36.16	13.77	32.79	29.32	18.68

NA = Not Available

Sources: U.S. Department of Energy, Energy Information Administration, *Monthly Energy Review June 1980* and *Annual Report to Congress 1979 Volume Two.*

Exhibit 2

Domestic Natural Gas Wellhead Prices
1955-February 1980

		Cents Per Thousand Cubic Feet	
		Paid By Interstate Pipeline Companies	Total U.S. Average
1955	AVERAGE	NA	10.4
1956	AVERAGE	NA	10.8
1957	AVERAGE	NA	11.3
1958	AVERAGE	NA	11.9
1959	AVERAGE	NA	12.9
1960	AVERAGE	NA	14.0
1961	AVERAGE	NA	15.1
1962	AVERAGE	NA	15.5
1963	AVERAGE	NA	15.8
1964	AVERAGE	NA	15.4
1965	AVERAGE	NA	15.6
1966	AVERAGE	NA	15.7
1967	AVERAGE	NA	16.0
1968	AVERAGE	NA	16.4
1969	AVERAGE	NA	16.7
1970	AVERAGE	NA	17.1
1971	AVERAGE	NA	18.2
1972	AVERAGE	NA	18.6
1973	AVERAGE	NA	21.6
1974	AVERAGE	NA	30.4
1975	AVERAGE	NA	44.5
1976	AVERAGE	47.9	58.0
1977	AVERAGE	69.5	79.0
1978	AVERAGE	83.9	90.5
1979	January	99.9	99.5
	February	102.3	101.8
	March	106.1	106.3
	April	116.7	107.0
	May	118.3	111.6
	June	118.3	112.9
	July	119.2	116.4
	August	125.6	119.0
	September	130.5	120.6
	October	135.6	124.0
	November	141.1	125.6
	December	135.0	128.9
	AVERAGE	121.6	114.9
1980	January	141.3	NA
	February	142.5	NA

N = Not Available

Sources: U.S. Department of Energy, Energy Information Administration, *Monthly Energy Review June 1980* and *Annual Report to Congress 1979 Volume Two.*

Exhibit 3

Comparison of 1977 Department of Energy Crude Oil Wellhead Price Estimates for 1985 With Actual Recent Prices

Dollars Per Barrel

	1977 DOE Estimate For 1985	Actual Recent Prices	
		Dec. 1979	March 1980
Third Tier/Newly Discovered	$21.90	$25.40	$34.67
Upper Tier	17.69	13.76	13.99
Lower Tier	7.91	6.21	6.35
Naval Petroleum Reserves	21.90	29.04	32.79
Stripper	21.74	34.99	36.33

Sources: Department of Energy, Energy Information Administration, *Annual Report to Congress, Volume II 1977,* page 139 and *Monthly Energy Review, June 1980.*

Exhibit 4

Comparison of Recent Department of Energy World Oil Price Forecasts for the Period 1985-1995

Prices in 1979 Dollars Per Barrel

Year of Annual Report	1985		1990		1995	
	Mid Range	High	Mid Range	High	Mid Range	High
1977	NA	NA	17.00	27.00	NA	NA
1978	16.00	23.30	20.00	26.00	25.50	34.00
1979	32.00	39.00	37.00	44.00	41.00	56.00

NA = Not available

Sources: U.S. Department of Energy, Energy Information Administration, *Annual Report to Congress,* 1977, 1978 and 1979.

Exhibit 5

Estimated Effective Government Share of Total Production Value From One-Sixth Royalty OCS Leases Sold During the Period 1975-1978 if Productivity Per Acre Equals Average Productivity Per Acre From OCS Leases Sold During the Period 1954-1970

	Acreage	Bonuses In $1000	Present Value of Bonuses in 1000's on 1978 Dollars
1975	1,679,877	$1,088,133	$1,422,256
1976	1,277,936	2,242,898	2,705,568
1977	930,074	1,558,581	1,724,143
1978	932,168	1,234,698	1,234,698
	4,820,055	$6,124,310	$7,086,655

Estimated Oil and Gas Production in Quadrillion Btu per Acre	.0101
Estimated Oil and Gas Production in Quadrillion Btu	48.7
Present Value of Oil and Gas Production in 1000's of 1978 Dollars at Deflated 1978 Price of $3.05 per MMBtu	$148,535,000
Present Value of Royalties @ One Sixth of Production Value	$24,755,833
Present Value of Government Share (Royalties Plus Bonuses)	$31,842,488
Government Share As a Percent of Total Production Value	21.4%

Exhibit 6

Estimated Additional Royalties or Bonuses Required to Maintain the Present Value of Oil and Gas Production, Exclusive of Royalties and Bonuses, for OCS Leases Sold In 1975-1978

Line No.		If Bids are Determined And Evaluated On the Basis of: (1) Oil and Gas Prices of $2.10 Per MMBtu	(2) Oil and Gas Prices of $3.05 Per MMBtu
1.	Acreage	4,820,055	4,820,055
2.	Estimated Oil and Gas Production In Quadrillion Btu per Acre	.0101	.0101
3.	Estimated Oil and Gas Production In Quadrillion Btu	48.7	48.7
4.	Present Value of Oil and Gas Production in 1000's of 1978 Dollars at Deflated 1978 Prices of:		
5.	(a) $2.10 per MMBtu	$102,270,000	—
6.	(b) $3.05 per MMBtu	—	$148,535,000
7.	Present Value of Royalties At one-sixth of Production Value	$ 17,045,000	$ 24,755,833
8.	Net Production Value, Exclusive of Royalties	$ 85,225,000	$123,779,167
9.	Present Value of Bonuses In 1978 Dollars:		
10.	(a) Actual	$ 7,086,655	—
11.	(b) Implicit	—	$ 45,640,822
12.	Present Value of Oil and Gas Production In 1000's of 1978 Dollars, Exclusive of Royalties and Bonuses	$ 78,138,345	$ 78,138,345
13.	Present Value of Royalties and Bonuses	$ 24,131,655	$ 70,396,655
14.	Government Share As a Percent of Total Production Value	23.6%	47.4%
15.	Increase in Bonuses or Royalties Required to Maintain Present Value of Oil and Gas Production, Exclusive of Royalties and Bonuses	-0-	$ 38,554,167

EXHIBIT 7

Estimates of Amount by Which Government's Share of OCS Resource Values Will be Less Than Fair Value If Government's Share is 5 Percent and 10 Percent Too Low

	Low	Mid Point	High
1. Total Offshore Undiscovered Recoverable Resources:			
2. (a) Crude oil in billion barrels	10.0	29.5	49.0
3. (b) Value @ $70 per barrel (in Billions)	$700	$2,065.0	$3,430
4. (c) Natural Gas in trillion cubic feet	42.0	111.5	181.0
5. (d) Value @ $6.60 per Mcf (in Billions)	$277.2	$735.9	$1,194.6
6. Total Value Undiscovered Recoverable Resources (in Billions)	$977.2	$2,800.9	$4,624.6
7. Percent of Total Undiscovered Resources to be Found and Produced Prior to End of Century	20.0	20.0	20.0
8. Total Value of Undiscovered Resources to be Produced Prior to End of Century (in billions)	$195.4	$560.2	$924.9
9. Percent of Line 8. Associated with Cash-bonus, Fixed Royalty Bidding System	70.0	70.0	70.0
10. Total Value of Undiscovered Resources to be Produced Prior to End of Century Associated with Cash-bonus, Fixed Royalty Bidding System (in billions)	$136.8	$392.1	$647.4
11. Amount by Which Government Will Not Receive Fair Value if the Effective Government Shares is Too Low by:			
(a) 5.0 percent, in billions	$6.8	$19.6	$32.4
(b) 10.0 percent, in billions	$13.7	$39.2	$64.7

Sources: (1) For undiscovered recoverable resources: U.S. Geological Survey Circular 725.

(2) For prices in current dollars: Energy Information Administration, *Analysis Report Midterm Energy Supply and Demand 1985-1995*, pages 4 and 6, averages of 1980, 1985, 1990 and 1995 prices.

APPENDIX A

QUALIFICATIONS OF GEORGE L. DONKIN

George L. Donkin is Vice President and Director of Petroleum Studies of J.W. Wilson & Associates, Inc.

Mr. Donkin holds a B.A. in economics from the University of Maryland and a M.A. in economics from that same university. He has been concerned with energy economics since 1970, when he became employed as an industry economist at the Federal Power Commission (now the Federal Energy Regulatory Commission).

From 1970 through September 1972, Mr. Donkin worked in the Area Rate Division of the FPC's Bureau of Natural Gas. This work related to various aspects of natural gas producer regulation, including analyses of gas production costs and the costs of finding and producing new natural gas and crude oil.

In September 1972, Mr. Donkin transferred to the Division of Economic Studies within the FPC's Office of Economics. His principal responsibilities there related to various phases of natural gas industry regulation.

In February 1974, Mr. Donkin became an independent economic consultant under a one-year contract with Cornell University. Much of his work during that year involved an analysis of the market structure of the petroleum and natural gas industries.

In February 1975, Mr. Donkin and others formed J. W. Wilson & Associates, Inc. Since the formation of J.W. Wilson & Associates, Inc., Mr. Donkin has undertaken numerous studies on behalf of federal, state and municipal governments, private enterprise, trade associations and nonprofit organizations on economic issues and problems in the general field of energy resources, transportation and utilization. These research projects have included the supply, transmission and distribution of energy; demand characteristics; cost characteristics; price structures; interfuel competition; and

regulatory policy; with particular emphasis upon petroleum and natural gas. A number of these studies have pertained to regulatory, antitrust and arbitration proceedings, and have been submitted as expert witness testimony in U.S. regulatory and court cases, and Congressional proceedings.

In February 1975, Mr. Donkin was appointed by the Chairman of the FPC to the Technical Advisory Task Force on Prospective Exploration and Development and Additions to Reserves of the National Gas Survey.

Mr. Donkin is a member of the International Association of Energy Economists.

The following is a summary of Mr. Donkin's expert testimony since 1973.

Before the Federal Power Commission and the Federal Energy Regulatory Commission:

In FPC Docket No. CI73-293, et al., testimony on behalf of Staff on the rate of development of offshore Louisiana oil and gas leases sold in the December 15, 1970 Federal lease sale.

In FPC Docket No. CP74-192, testimony on behalf of eight Florida cities on the extent and results of exploratory and developmental drilling activity in onshore and offshore areas of the Texas and Louisiana Gulf Coast producing areas.

In FPC Docket No. RP75-79, testimony on three occasions on behalf of eight Florida cities on economic issues relating to natural gas curtailment policies during periods of supply inadequacy.

In Docket No. RM77-13, testimony on behalf of the American Public Gas Association and the Consumer Advocate of the State of Pennsylvania on factors affecting the cost of finding and producing new natural gas supplies.

In Docket No. OR78-1, testimony on behalf of the Arctic Slope Regional Corporation dealing with competitive issues and the relationship of the undiscovered onshore and offshore crude oil resource base

in North Alaska to tariff levels on the Trans-Alaska Pipeline System.

In Docket Nos. CP78-391, et al., testimony on behalf of the Ohio Consumers' Counsel on the extent to which a national need exists for supplemental coal gas supplies. This testimony dealt with the costs associated with conventional and non-conventional alternatives to gas supplies gasified from coal.

Before the Department of Energy:

Testimony on behalf of the Energy Policy Task Force of the Consumers' Federation of America on the competitive structure of the domestic petroleum industry and the need to monitor and/or regulate the priceof No. 2 home heating oil.

Before the Michigan Public Service Commission:

Testimony on behalf of the Michigan Attorney General on the appropriate level of future annual natural gas sales to be used in establishing retail rates for Michigan Consolidated Gas Company.

Testimony on behalf of the Michigan Attorney General on the automatic purchased gas cost adjustment procedures of the Michigan Consolidated Gas Company.

Before the Ohio Public Utilities Commission:

Testimony on behalf of the Ohio Consumers' Counsel on policy concerning new gas customer additions and new loads for existing gas customers.

Testimony on behalf of the Ohio Consumers' Counsel on gas utility rate design and gas supply issues in the retail rate increase request of the East Ohio Gas Company.

Before the Pennsylvania Public Service Commission:

Testimony on behalf of the Pennsylvania Office of Consumer Advocate on gas supply issues and the

need for synthetic natural gas supplies in the retail rate increase application of National Fuel Gas Distribution Corporation.

Before the Rhode Island Department of Public Carriers and Utilities:

Testimony on behalf of the Department staff on gas utility rate design and gas supply issues in the retail rate increase application of Providence Gas Company.

Before the District of Columbia Public Service Commission:

Testimony on behalf of the D.C. People's Counsel on gas supply and market expansion issues in the retail rate increase application of the Washington Gas Light Company.

Before the United States District Court for the Eastern District of New York:

Testimony in 1976 and 1977 on behalf of the Counties of Nassau and Suffolk on the inadequacies in the U.S. Department of the Interior's assessment of the onshore and offshore resource base and an analysis of the probable benefits and costs associated with crude oil and natural gas production from the Mid-Atlantic Outer Continental Shelf.

Before the United States Congress:

Testimony on matters relating to the structure of the U.S. oil and gas industries and offshore oil and gas producing operations before: Senate Committee on Judiciary, Subcommittee on Antitrust and Monopoly (October 1973); House Committee on Interstate and Foreign Commerce (March 1974); House Ad Hoc Select Committee on Outer Continental Shelf (November 1975); House Committee on Interstate and Foreign Commerce (February 1977); and House Committee on the Interior, Subcommittee on Mines and Mining (February 1977).

RESPONDENTS REPLY MEMO
OF JULY 14, 1980

EXHIBIT 12

DESIGN ELEMENTS OF OCS LEASING EXPERIMENTS MANDATED UNDER S. 521

by

Marshall Rose
Department of the Interior
Office of Policy Analysis

February 1976

Abstract

This paper considers the composition and size of the OCS experiment mandated in S. 521. Four of the nine experimental systems listed in S. 521 have been identified as clearly superior testing candidates. They are:

—Fixed cash bonus with royalty bid

—Fixed cash bonus with profit share bid

—Fixed profit share with cash bonus bid

Fixed profit share, cash bonus bid, and one percent working interest shares.

To efficiently examine a particular hypothesis, 40-60 observations per experimental system are needed. This suggests that for hypotheses relating to leased tracts only, up to 50-80 tracts might have to be *offered* under each of the relevant experimental systems in order to generate 40-60 observations on leased tracts.

The suitable test size of the OCS experimental appears to be between 10 and 25 percent of tracts offered during

the two-year testing period. Under an accelerated leasing schedule, the appropriate test size is probably closer to 10 percent, while a 25 percent test is likely to be more appropriate for low rates of leasing.

I. *Introduction*

Senate bill S. 521 (Section 203) directs the Secretary of the Department of the Interior to experiment with alternative OCS leasing systems over a two-year period. The results of the experiment "shall be incorporated into an overall analysis of these [leasing] systems and this analysis shall be provided to Congress no later than 12 months after the sale date."

The following elements are of primary concern in structuring an experimental design of OCS leasing systems:

1. Objectives of the tests.
2. Systems to be tested.
3. Sample size of individual systems.
4. Sample size of the entire experiment.
5. Statistical design based on specific hypotheses to be tested.
6. Supplementary analysis accompanying empirical tests.

The scope of this paper is limited to the first four of these issues.

II. *Objectives of the OCS Experiment*

Ideally, the experiment should provide information which allows comparison of the alternative leasing systems under consideration with respect to public and private benefits and costs. In this regard the following factors are most important: level of the bids; number of bidders; distribution of bidders by firm size and frequency of

past participation in OCS auction sales; expected Federal revenues; development and production profiles; and ease of program administration.

The level of the individual bids indicates the willingness of firms to pay for the lease as a function of the terms of the auction and the uncertainty in value associated with specific tracts. The number and distribution of bidders indicates the degree of auction competition associated with alternaive leasing systems. Federal revenues and development and production profiles are relevant for determining the expected present value of government receipts as well as the level and timing of output associated with each of the leasing systems considered. The importance of program administration is self evident.

If the information cited above could be generated in sufficient detail, a rigorous comparison of alternative leasing systems could then be conducted. Unfortunately, we can expect that the actual level of information generated will not be nearly sufficient to allow such a comparison.

One reason is that bidders may disguise their bids (or not bid at all) in order to bias the results in favor of the leasing system most favorable to themselves. Owing to differences in bidding strategy, risk aversion, and estimates of reserves, it may not be possible to distinguish spurious bids from truthful ones. Even if this were possible, it would be extremely difficult to infer the production profiles used in generating the bids. This is a particularly vexing problem when the bid variable is a profit share or royalty rate. In the former case, the highest bidding firm may be a relatively inefficient producer, and its bid may reflect a high percentage of a relatively low absolute level of profits. In the latter case, the winning firm may simply bid a speculative royalty rate that would discourage or delay production unless actual reserves are very high. Furthermore, it would take several years to determine the extent to

which a particular leasing system induced such speculative bidding tactics.

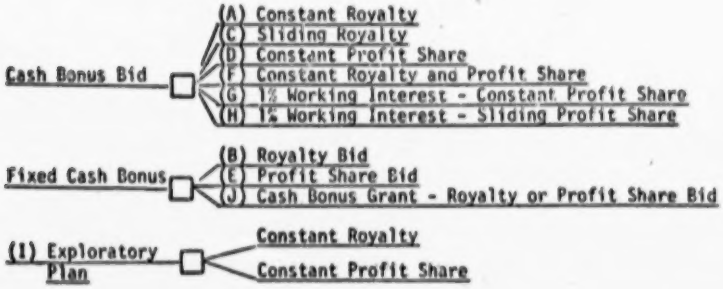
As a result, the information generated by a bidding experiment cannot be used to evaluate alternative systems in a comprehensive and timely manner. Nevertheless, a bidding experiment can be used for more modest purposes, such as testing the predictive reliability of independently developed leasing models; examining a limited number of relevant factors among leasing systems, such as the type and number of bidders, and the ease with which a given system can be administered; and evaluating in detail designated leasing systems with regard to bidding strategies as the given element (royalty or profit share rate) is changed.

III. *Leasing Systems to be Tested*

S. 521 specifies nine basic experimental systems, and labels them (B) through (J). The cash bonus bidding system is denoted by (A). These 10 systems are shown in Figure 1.

Figure 1

OCS Leasing Systems Available Under S. 521



For purposes of the OCS experiment, five of these leasing systems are inferior test vehicles. They are C, H, F, J, and I. Their shortcomings are described below:

(C) Cash bonus bids with sliding scale royalty, and

(H) Cash bonus bids with sliding scale profit share: Based on research to date,[1] it appears that nondevelopment rather than early abandonment is the more serious economic problem associated with royalty and profit shares. Thus, we can expect that modification of constant rates to variable rates will not significantly affect production or bidding strategies. Accordingly, the results obtained from testing systems A (cash bonus bids with constant royalty) and G (cash bonus bids with constant profit share) can be used in conjunction with our analytical models to infer the characteristics of systems having sliding scale rates.

(F) Cash bonus bids with fixed royalty and fixed profit share: With both the royalty and profit share as fixed elements, it is difficult to separate the effect of each element on the cash bonus bid and upon development strategies. The individual effects of each element may be more accurately evaluated by considering two leasing strategies: A (cash bonus bid with constant royalty) and D (cash bonus with constant profit share).

(J) Fixed cash bonus, returned as grants to cover exploration costs, with royalty or profit share bid: We can expect that the cash bonus grants will simply increase the bid variable by an equivalent amount. In this case, leasing system J is largely redundant, since the relevant information can be obtained from systems B

[1] "Analysis of Alternative Bidding Systems for OCS Oil and Gas Leases," Office of OCS Program Coordination, Department of the Interior, April 29, 1975, draft.

(fixed cash bonus with royalty bid) and E (fixed cash bonus with profit share bid).

(I) Exploratory plant: Owing to the ambiguity of the bid variable and the subjective nature of the bid evaluation, it will be difficult to formulate testable hypotheses about this type of leasing system.

Based on the foregoing discussion, we conclude that systems C, H, F, J and I are inferior and/or redundant leasing systems for empirical testing purposes. In fact, we could also argue that these systems are dominated by the others on theoretical grounds as well, but it is not necessary (perhaps not desirable as well) to do so at this time.

IV. *Sample Size Per Experimental System*

Statistical tests of significance involve, among other things, determination of whether a difference in sample statistics, e.g., mean values, is sufficiently large to infer that the samples are drawn from different populations, for example, populations having unequal mean values. As the sample size increases, the test becomes more sensitive, in the sense that smaller measured differences in the sample means can be considered statistically significant.

In testing a particular hypotheses at a specified level of confidence, the magnitude of the difference in statistics that is significant depends upon the sample size and the estimated standard deviation of the appropriate variable under consideration. For example, suppose that we want to test whether or not there is a significant difference in the mean number of bids per tract received for two leasing systems, namely cash bonus bidding, b, and royalty bidding, r.

Denote the sample mean number of bonus bids by Xb, and the sample mean number of royalty bids by Xr.

The symbol σ represents the estimated standard deviation of the variable Xr — Xb.

The significance ratio is defined by

$$T = \frac{Xr - Xb}{\sigma} \qquad (1)$$

When the samples are independent,

$$\sigma^2 = \sigma r^2 + \sigma b^2, \qquad (2)$$

and

$$\sigma r^2 = Sr^2/(Nr - 1.0),$$

where Sr^2 is the variance of the sample number of royalty bids, and Nr is the size of the royalty sample. Th term σb^2 is defined in a similar way.

To determine if Xr — Xb is significant, we compare the value of T to the number of standard deviates taken from the Students t distribution for Nr + Nb — 2 degrees of freedom. If T exceeds this number of standard deviates at a given level of confidence, we can infer that the difference in sample mean values is statistically significant.

If we let t represent the number of standard deviates, then $t\sigma$ is the minimium difference in sample mean values that can be considered significant. As the sample size increases, both t and σ decline, so that smaller differences in mean values become significant.

At the same time, larger sample sizes are more expensive. In the absence of cost-benefit measures, there is no exact method for finding the optimal sample size. Accordingly, we proceed in the following heuristic fashion.

The standard assumption is made that if Si (i = r, b) is known for any Ni, then this Si is our best estimate of the sample standard deviation for any Ni[2]. Also, over

[2] See, for example, Snedecor, G., *Statistical Methods*, Iowa State University Press, Ames, Iowa, 1956, pp. 60-61.

the range of sample sizes in which we will be interested, t can be taken as fixed. Thus, as the sample size increases, the improved sensitivity of the experiment can be measured solely by changes in σ.

Given sample values for the Si and Ni, we can compute the proportional change in σ as the Ni are varied. In this way we can find a range for Ni within which the appropriate sample size is likely to reside. We demonstrate this approach with the following example.

In OCS Sale #36, 297 tracts were offered: 10 under royalty bidding, and 287 under bonus bidding. The following statistics were found for the number of bids per tract.

$$Xr = 5.3, \qquad Sr = 4.80$$

$$Xb = 1.1, \qquad Sb = 1.56$$

Computing the significance ratio from equation (1), we find that $T = 2.63$. At the 95% level of confidence, $t = 1.96$ for 295 degrees of freedom. Since $T > t$, the difference in mean values is considered significant.

Calculating σ in equation (2), we then find that $t\sigma = 3.14$, which is the minimum difference in sample mean values that can be detected by this test as being significant. The effect of alternative test sizes on the level of significance is shown in Table 1.

Three separate cases are considered therein. In the first case, we let $Nr + Nb = 297$. The second case has $Nr + Nb = 80$. The third case assumes that $Nb = 70$. These sample sizes span the range of expected values of future sale sizes.

For each of these three cases, the proportional effect on $t\sigma$ as the sample size changes is approximatel by σ_0. This term represents the normalized value of σ, where $\sigma_0 = 1.0$ for $Nr = 10$ in each case. The results are seen to be quite similar for all three cases. An increase in

Table 1

Effect of Sample Size on the Level of Significance

Sr = 4.80
Sb = 1.56

Nr	Nb	σ	σ_0
10	287	1.60	1.00
20	297	1.10	0.69
30	267	0.89	0.56
40	257	0.77	0.48
50	247	0.68	0.43
60	237	0.63	0.39
75	222	0.56	0.35
100	197	0.49	0.31
200	97	0.38	0.23
10	70	1.61	1.00
20	60	1.12	0.70
30	50	0.92	0.57
40	40	0.81	0.50
50	30	0.74	0.46
60	20	0.72	0.45
70	10	0.78	0.48
10	70	1.61	1.00
20	70	1.12	0.70
30	70	0.91	0.57
40	70	0.79	0.49
50	70	0.71	0.44
60	70	0.65	0.40
75	70	0.49	0.30
100	70	0.42	0.26
200	70	0.39	0.24

Nr from 10 to 20 reduces σ_0 by 30 percent. An increase in Nr from 20 to 30 reduces σ_0 by 20 percent. An increase in Nr from 30 to 40 reduces σ_0 by approximately 15 percent. When Nr increases from 40 to 50, σ_0 is reduced by about 10 percent. Additional increases in Nr result in proportionately smaller reductions in σ_0.

These results suggest that, for the particular hypothesis being tested, $40 \leq Nr \leq 60$ is an appropriate test size. However, the results are significantly more general than one might suspect.

It is easy to show that σ_0 is unaffected by scalar changes in the Si. Therefore, σ_0 is the same for a given value of Sr/Sb. In the sample problem, the values of σ_0 in Table 1 are unchanged as long as $Sr/Sb = 3.08$. Experimentation with different values of Sr/Sb shows that, for Nb constant and lying within the range of 50-300, the largest reduction in σ_0 for given changes in Nr occur at $Sr/Sb \cong 3.0$. Using the reduction in σ_0 with respect to changes in Nr as a proxy for marginal benefits, it follows that at any level of Nr, marginal benefits will be lower when $Sr/Sb \cong 3.0$. Thus, if the magnitude of Sr/Sb is substantially different from 3.0, we will find that the appropriate range of sample sizes for the experimental systems will lie below $40 \leq Nr \leq 60$.

In any forthcoming OCS experiment, it may be desirable to test two bidding systems on the same set of tracts. In this way differences in tract parameters could be taken into account or differences in the bidding results could be analyzed with more precision. When the sample results are paired in this manner, it is likely that the results will not be independent.

The formula for computing σ for paired samples is

$$\sigma^2 = \sigma r^2 + \sigma b^2 - 2R\sigma r\,\sigma b,$$

where R is the correlation between the two samples. Because Nr=Nb in these cases, it can be shown that

$$\sigma_0 = 3.0/\sqrt{Nr - 1.0}\ .\ \text{3/}$$

That is, σ_0 is not dependent upon either the absolute or relative levels of the Si, nor is it dependent upon R. The numerical relationship between σ_0 and the sample size is presented in Table 2.

3/ The numerator is equal to $\sqrt{Nr-1.0} = 3.0$ for Nr = 10. As the sample size increases, σ is equal to a constant, which depends upon Sr, Sb, and R, multiplied by $1.0/\sqrt{Nr - 1.0}$.

Table 2

The Effect of Sample Size on the Level of Significance: Paired Samples

Nr=Nb	10	20	30	40	50	60	75	100	200
σ_0	1.00	0.71	0.58	0.50	0.45	0.41	0.37	0.32	0.22

Comparison between Tables 1 and 2 does not reveal any substantial differences in the effect of sample size on the level of significance for paired and unpaired samples. However, as a practical matter, it appears desirable to design an experiment in which Nr is somewhat larger when the samples are paired. The reason is that, in these cases, we can expect some firms to submit bids on only one of the two leasing systems for the paired-sample tracts. In this way they can still win the tract if the system under which they bid on is chosen for evaluating bids. However, in unpaired samples, the firm obviously cannot win a tract if it refuses to bid under an experimental system, if this is the only bidding system utilized on that tract.

In summary, this section has shown that, in order to generate satistically valid results in an efficient manner, no more than 40-60 observations are needed per experimental system. Assuming that 75 percent of tracts offered receive serious bids, we conclude that the *maximum* number of tracts that should be offered under any one experimental leasing system is between 50 and 80.

V. *Overall Size of the Experiment*

This section considers the following question: during the period of the OCS leasing experiment, what percent of available tracts should be offered under experimental systems? To answer this question, a decision theoretic model has been developed. The model is explained in detail in the Appendix.

The primary elements of the model are depicted in Figure 2, where square nodes represent decision points and circles represent chance events. The decision problem is to choose between the options of not testing, NT, or testing at sixe X, denoted by TX. This decision depends upon the worth of not testing, Wn, compared to the worth of testing at sixe X, denoted by Wx. By worth we mean the net social value of tracts leased according to the relevant decision rules associated with testing and not testing during the k-year planning period of future OCS sales.

The model assumes that if we do not test any experimental leasing systems, then the cash bonus bidding system will be chosen. This choice is denoted by Ab.

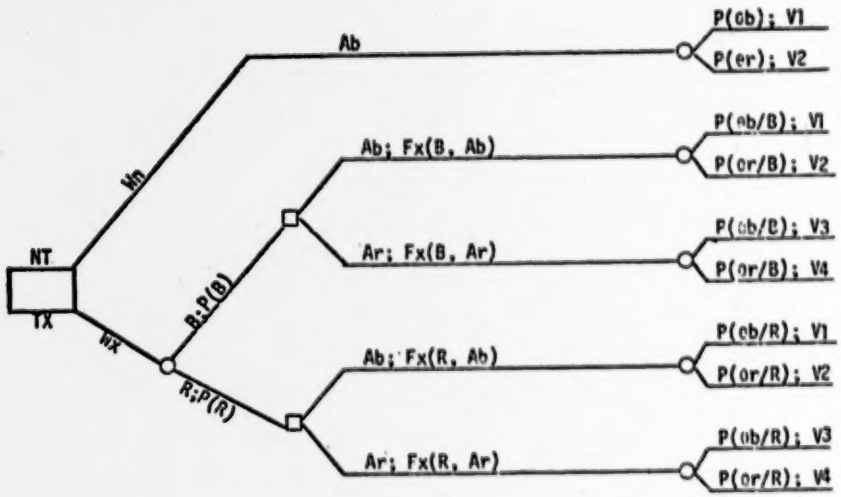
If testing is undertaken, then 100X percent of tracts offered during the h-year test period will be leased under experimental systems. The test will signal that either cash bonus bidding (B) or one of the experimental systems (R) is the better leasing system. "Better" means here that the particular leasing system so described generates a higher aggregate social value for all tracts offered during the planning period, compared to its counterpart systems.

Given a particular test signal, B or R at the end of the test period, a choice is then made to lease tracts using cash bonus bidding or using one of the experimental systems. The latter choice is denoted by Ar. The choice of Ab or Ar for test signal B or R depends upon the expectation function Fx. The calculation of Fx is described in the Appendix.

Suffice it to say here that Fx depends upon (1) the prior probabilities P (θb) and P(θr), representing the chances that bonus or one of the experimental systems is the true state, i.e., the best method of leasing; (2) the information matrix P′, which indicates the choices that the test will correctly predict which system is best, for each of

Figure 2

Decision Analysis Testing Problem



V1 = V1 (Ab,øb)
V2 = V2 (Ab,ør)
V3 = V3 (Ar,øb)
V4 = V4 (Ar,ør)

the two states, θb and θr; (3) the payoff matrix V', which represents the relative values associated with making correct and incorrect decisions for a given state; and (4) the probabilities P(B) and P(R) which represent the chances of obtaining test signals B or R.

For any set of parameters, Wn and Wx are computed over the potential range of V'. The range of V' in which Wx > Wn is then determined. Finally, the probability that V' will fall within the range that results in Wx > Wn is found. This probability is denoted by $P(Wx > Wn) = \beta$.

The numerical results for β are shown in Tables 3, 4 and 5. The following parameters are stipulated:

—The discount rate, i, is 10 percent.

—The test period h, is two years.

—The planning period k, is ten years.

—There is an 80 percent chance that the test results will correctly predict the true state, i.e., $P(B/\theta b) = P(R/\theta r) = 0.8$.

Recall that $P(\theta b)$ is the prior probability that cash bonus bidding is a "better" leasing system than any of the experimental systems. The symbol Z represents the ratio of the number of tracts leased during the 2-year test period to the number of tracts leased during the 10-year planning period. The results shown in the Tables are independent of the absolute number of tracts leased in periods h and k.

A 50 percent test size is considered first, in Table 3. For $P(\theta b) > 0.5$, it is unlikely that testing at this level will be more valuable than not testing, for virtually any feasible value of Z. Only in the presence of ignorance, defined as $P(\theta b) = 0.5$, does it appear marginally worthwhile to prefer a 50 percent test to not testing. Because we have been intentionally optimistic with regard to the

accuracy of testing, it is prudent to reject a 50 percent test size.

Consider next a 25 percent test. Table 4 shows that, unless $P(\theta b) < 0.55$, a 25 percent test cannot be justified. (The most likely value of Z is 0.3). Accordingly, it appears from these findings that the OCS experiment should be smaller than 25 percent.

Table 5 considers a 12.5 percent test size. In this case we find that testing is likely to be worth more than not testing if $P(\theta b) \leqslant 0.6$. A test of this size does not appear inefficient.

Interpretation of these results with regard to the optimal sample size remains, to a large extent, a matter of judgment. Based on the decision analysis, it appears that the optimal sample size is more than 10 percent, but less than 25 percent.

In general, the appropriate percentage test size is inversely related to Z. This is the case because as the (relative) number of tracts leased during the test period declines, the number of tracts remaining to be leased after this period increases. As a result, the value of testing tends to increase when Z decreases, since the optimal decision rules that derive from testing can then be applied to a greater number of remaining tracts. These observations suggest that as $Z \rightarrow 0.4$, the suitable test size is closer to 10 percent, while for the case of $Z \rightarrow 0.2$, the appropriate test size is approximately 25 percent.

Table 3

Probability that a 50 Percent Test is More Valuable Than Not Testing */

	$\beta = P(Wx > Wn)$				
Z	$P(\theta b) = 0.5$	$P(\theta b) = 0.6$	$P(\theta b) = 0.7$	$P(\theta b) = 0.8$	$P(\theta b) =$
0.2	0.60	0.40	0.06	- 0 -	- 0 -
0.3	0.52	0.28	- 0 -	- 0 -	- 0 -
0.4	0.45	0.17	- 0 -	- 0 -	- 0 -
Average	0.52	0.28	0.02	- 0 -	- 0 -

Table 4

Probability that a 25 Percent Test is More Valuable Than Not Testing

	$\beta = P(Wx > Wn)$				
Z	$P(\theta b) = 0.5$	$P(\theta b) = 0.6$	$P(\theta b) = 0.7$	$P(\theta b) = 0.8$	$P(\theta b) = 0.$
0.2	0.66	0.50	0.22	- 0 -	- 0 -
0.3	0.61	0.42	0.10	- 0 -	- 0 -
0.4	0.56	0.34	- 0 -	- 0 -	- 0 -
Average	0.61	0.42	0.11	- 0 -	- 0 -

*/ Recall that the accuracy of any test size (defined by matrix P' in the Appendix) is assumed equal to 80 percent in Tables 3, 4 and 5. If we allow the test accuracy to decline below 80 percent for smaller test sizes, then in these cases β will also decline and the results become more favorable to not testing. This suggests that if testing is, in fact, undertaken, a modest test size is appropriate.

Table 5

Probability that a 12.5 Percent Test is More Valuable
Than Not Testing

	$\beta = P(Wx > Wn)$				
Z	$P(\theta b) = 0.5$	$P(\theta b) = 0.6$	$P(\theta b) = 0.7$	$P(\theta b) = 0.8$	$P(\theta b) = 0.9$
0.2	0.70	0.56	0.31	- 0 -	- 0 -
0.3	0.67	0.52	0.24	- 0 -	- 0 -
0.4	0.64	0.46	0.17	- 0 -	- 0 -
Average	0.67	0.51	0.24	- 0 -	- 0 -

Appendix: Decision Theoretic Model

The decision analysis model considers two states of nature. The first, denoted by θb, represents the state wherein cash bonus bidding, with royalty or profit share fixed at any predetermined level, is the "better" leasing system. "Better" is used here to suggest that tracts leased under cash bonus bidding generate a higher net social value than tracts leased under any one of the experimental systems. Similarly, θr denotes the state wherein one of the experimental systems generates a higher net social value than the cash bonus bidding system. The prior probabilities $P(\theta b)$ and $P(\theta r)$ represent the likelihood that either θb or θr is the true state. Accordingly, $P(\theta r) = 1 - P(\theta b)$.

The symbol B represents experimental test results predicting that θb is the true state, while the symbol R denotes test results suggesting that θr is the true state. The information matrix given by P' below

Test Result \ State	θb	θr
B	$P(B/\theta b)$	$P(R/\theta b)$
R	$P(B/\theta r)$	$P(R/\theta r)$

$= P'$

denotes the likelihood of obtaining the designated test signals conditional upon specified states of nature. For example, $P(B/\theta b)$ is the probability that testing will (correctly) predict that θb is the true state, given that it is, in fact the true state.

The decision to choose cash bonus bidding is denoted by Ab. The decision to choose one of the experimental systems is denoted by Ar. The payoff matrix can be represented by V' below.

Action \ State	θb	θr
Ab	$V1(Ab,\theta b)$	$V2(Ab,\theta r)$
Ar	$V3(Ar,\theta b)$	$V4(Ar,\theta r)$

$= V'$

For example, $V1 = V1(Ab,\theta b)$ denotes the payoff that derives when the cash bonus bidding system is used on a tract, given that cash bonus bidding is, in fact, a better leasing system than any one of the experimental leasing systems.

Suppose that the ratio of tracts leased to tracts offered is the same for any of the leasing systems under consideration. Then V can be interpreted as representing the net social value per leased tract associated with a designated action, given a specified state.

The ratio of the number of tracts leased (offered) under experimental systems to the total number of tracts leased (offered) during the test period is denoted by X. The symbol Z represents the ratio of the number of all tracts leased during the test period to the total number of tracts leased during the planning period. It follows that XZ is the ratio of the number of tracts leased under experimental systems during the test period to the total number of all tracts leased during the planning period. If M tracts will be leased during the planning period, then MXZ is the number of tracts in the OCS experiment.

At this point it is possible to develop expressions for the worth associated with not testing, given by Wn, and the worth associated with a test of a specified size X, given by Wx. Consider first the expression for Wn.

The following terms are defined:

h = number of years in the testing period.

k = number of years in the planning period.

i = discount rate.

Without testing, the cash bonus bidding system is assumed to be employed throughout the planning period. The expected worth of a tract leased with this system at time t = 0 is given by

$$E = P(\theta b)\, V1 + P(\theta r) V2.$$

The discount factors are defined by

$$D^1 = \sum_{t=0}^{h-1} (1 + i)^{-t}$$

$$D^2 = \sum_{t=h}^{k-1} (1 + i)^{-t}$$

Suppose that tracts are leased uniformly during both period h and during period k - h. There will then be MZ/h tracts leased per year for h years, and M(1 - Z)/(k - h) tracts leased per year for k - h years. Therefore, we can write

$$Wn = E\left\{\frac{MZ}{h} D^1 + \frac{M(1 - Z)}{k - h} D^2\right\} \qquad (4)$$

Now consider Wx. The marginal and posterior probabilities are computed from Bayes' Theorem:

$$P(B) = P(B/\theta b)\ P(\theta b) + P(B/\theta r)\ P(\theta r)$$

$$P(R) = 1 - P\ (B)$$

$$P(\theta b/B) = P(B/\theta b)\ P(\theta b)/P\ (B)$$

$$P(\theta r/B) = 1 - P\ (\theta b/B)$$

$$P(\theta b/R) = P(R/\theta b)\ P(\theta b)/P\ (R)$$

$$P(\theta r/R) = 1 - P\ (\theta b/R)$$

Denote the expectation associated with decisions given test signals by Fx. Let

$$H1 = \frac{MZ(1 - X)}{h} D^1 + \frac{M(1 - Z)}{k - h} D^2$$

$$H2 = \frac{MZX}{h} D^1$$

$$H3 = \frac{MZX}{h} D^1 + \frac{M(1 - Z)}{k - h} D^2$$

$$H4 = \frac{MZ\ (1 - X)}{h} D^1$$

The expectation functions, Fx, can now be expressed by

$$Fx(B, Ab) = P(\theta b/B)\ \{V1(H1) + V3(H2)\} + P(\theta r/B)\ \{V3(H1) + V4(H2)\}$$

$$Fx(B,Ar) = P(\theta b/B)\ \{V3(H3) + V1(H4)\} + P(\theta r/B)\ \{V4(H3) + V2(H4)\}$$

$$Fx(R,Ab) = P(\theta b/R)\{V1(H1) + V3(H2)\} + P(\theta r/R)\{V2(H1) + V3(H2)\}$$

$$Fx(R,Ar) = P(\theta b/R)\{V3(H3) + V1(H4)\} + P(\theta r/R)\{V4(H3) + V2(H4)\}$$

From these expressions we can write

$$Wx = P(B)\{\max [Fx(B,Ab), Fx(B,Ar)]\} + P(R)\{\max [Fx(R,Ab), Fx(R,Ar)]\} \quad (5)$$

Ordinarily, it would be sufficient to compute Wn and the Wx, and then to choose the test size at which the worth is at a maximum. However, we do not know the magnitude of the elements in the payoff matrix V. 4/

The approach taken is to choose, on the basis of observed and inferred behavior, a V which ranges over the likely values of the (normalized) payoffs. For example, because it is clear that making a correct decision for a given state of nature is better than making an incorrect decision, it follows that

$$V1 > V2, \quad (6)$$

$$V4 > V3. \quad (7)$$

Further, the cash bonus bidding system has been used for many years, rather than any one of the experimental systems. Assuming that, with our current state of knowledge, the same decision, Ab, would continue to be made in the future, it follows that we can infer the relationship given by

$$P(\theta b)\, V1 + P(\theta r)V2 > P(\theta b)\, V3 + P(\theta r)\, V4 \quad (8)$$

Although we believe that $P(\theta b) > 0.5$, we also believe that, based on our current level of knowledge, the cash bonus bidding system would continue to be used even if $P(\theta b)$ were as low as 0.5. 5/ Stated equivalently, we find that when $P(\theta b) = 0.5$, expression (8) becomes

$$V4 - V2 < V1 - V3 \quad (9)$$

4/ We do not have much information about P either. Nevertheless, the numerical results are seen to favor modest test sizes at a level of P which is intentionally favorable to testing in general.

5/ To the extent that $P(\theta b) < 0.5$, and Ab would be chosen, the numerical results generated become more favorable to smaller test sizes. Of course, if we thought that Ab would be chosen only if $P(\theta b) > 0.5$, the argument tends to favor larger test sizes.

A payoff matrix that satisfies (6), (7), and (9) is represented by

$$V' = \begin{bmatrix} 1.0 & 0 \\ 0 & V4 \end{bmatrix} \qquad (10)$$

where $0 < V4 < 1.0$.[6/] This range of V4, as well as inequality (9), appear reasonable when it is recalled that there are up to nine experimental systems to consider. Even if θr is the true state, and decision Ar is made, we still may not choose the "best" one of the experimental systems. That is, as the number of experimental systems increases, the posterior probabilities associated with any one of the experimental systems, $P(\theta r/R)$, decline, so that the expected payoffs from choosing Ar also decline. Thus, if V4 (in normalized form) is considered an expected value over all experimental systems, the relationship given by (9) appears justified.

At first glance it might seem that the choice of the unit matrix for V' above is somewhat arbitrary. Some reflection, however, indicates that this is not the case. Any V' which satisfies the constraints in (6), (7) and (9) is equivalent for our purposes to the unit matrix given in (10). Any one of these alternative matrixes can be converted into (10) by adding (subtracting) a constant to any column, and/or by multiplying (dividing) the entire matrix by a scalar. Such operations do not affect the ranking of column elements or the ratio of column differences, so that all constraints are preserved.

In addition, our objective is to find the level of V4 at which Wx = Wn. This break-even level, expressed as a fraction of the feasible range of V4, is unaffected by changes in V' of the sort just described.

To prove this, we first set Wx = Wn, using equations (4) and (5). The solution is of the form

$$\frac{V1 - V3}{V4 - V2} = \phi \qquad (11)$$

where ϕ is a constant that depends upon the problem parameters. Let the solution of (11) be given by $V4 = \bar{V4}$. Define the relative break-even level of V4 by

$$\beta = \frac{\max V4 - \bar{V4}}{\max V4 - \min V4} \qquad (12)$$

6/ The author is indebted to Bart McGuire of the Interior Department for suggesting this simplified form for V'. Professor McGuire also provided a computer program for generating the numerical results presented in Tables 3, 4 and 5.

Let V'be given by (10). It can be demonstrated that for any modification in this V'by a scalar and/or by adding constants to columns, the solution of (12) is always

$$\beta = \psi - 1/\psi \ ,$$

and the proof is completed.

Assuming that V4 in uniformly distributed over its feasible range, it follows that β can be interpreted as the probability that Wx exceeds Wn, i.e.,

$$\beta = P(Wx > Wn).$$

On the basis of the magnitude of this measure for different test sizes and problem inputs, we can infer the appropriate size of the OCS leasing experiment. Numerical results are presented in Tables 3, 4 and 5.

RESPONDENTS REPLY MEMO OF JULY 14, 1980

EXHIBIT 13

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF THE SECRETARY
Washington, D.C. 20240

April 17, 1978

Memorandum

To: Deputy Assistant Secretary—Policy, Budget and Administration

From: Marshall Rose /s/ MR

Subject: Preliminary Analysis of OCS Sale #43

This memorandum analyzes two aspects of Sale #43: the competitive nature of the sale, and the bidding behavior on fixed royalty versus sliding-scale tracts. The results indicate that although two companies, Exxon and Tenneco, were high bidders on 61% of the tracts, they did no better than the other bidders in terms of the bonuses paid per unit of producible reserves as estimated by GS or per dollar of GS estimated tract value. Analysis of bidding behavior does not reveal any significant differences in the number of bids or the relative amounts bid between fixed royalty or sliding-scale tracts.

Competition in the Sale

Only 11 different companies chose to participate in Sale #43. This was probably due mainly to two factors: unfavorable reserve prospects and unfamiliarity with the sliding-scale lease terms.

The relative performance of the two companies having the highest bids on the largest number of tracts in the

sale is presented in Table 1. Both Exxon and Tenneco are seen to have paid modestly less than the other bidders per unit of reserves that are expected to be produced on their high-bid tracts. Exxon's high bids were more than twice the GS valuation, while Tenneco's high bids exceeded the GS estimates by almost 50%. The remaining high bids were approximately 70% greater than the GS values.

Although Exxon's high bids (if accepted) will capture 28% of the expected reserves, it paid 28.5% of the sale's high bids. Similarly, Tenneco's high bids were on tracts containing 27.6% of the expected reserves, while its bonus bids represented 25.4% of the high bids.

Table 1. *Measures of Company Performance*

	Exxon	Tenneco	Others	All Companies
Amount paid for each dollar of GS value	$2.07	$1.48	$1.72	$1.73
Percent of total expected reserves	28.0%	27.6%	44.4%	100%
Percent of total high bids	28.5%	25.4%	46.1%	100%
Percent of expected reserves on sliding scale tracts	33.1%	24.6%	42.3%	100%
Percent of high bids on sliding scale tract	41.0%	33.8%	25.2%	100%
Percent of expected reserves on fixed royalty tracts	0.0%	44.4%	55.6%	100%
Percent of high bids fixed royalty tracts	0.5%	6.8%	92.7%	100%

Exxon and Tenneco had high bids on more than 70% of the sliding-scale tracts, representing almost 58% of the expected reserves on this class of tracts. However, these companies paid approximately 75% of the total bonuses on these tracts.

On the fixed royalty tracts, Exxon won only one low value tract. Tenneco did considerably better, winning five tracts having 44.4% of the expected reserves and paying only 6.8% of the high bids for all fixed royalty tracts. Nevertheless, the expected reserves captured by Tenneco on these tracts represented less than 7% of the total expected reserves on all tracts that received bids under both leasing systems.

In sum, the two companies that were most successful in terms of tracts won were not particularly adept at getting the most value per dollar expended. In this regard, Exxon's performance was somewhat worse than the remaining nine bidding firms, while Tenneco's results were slightly better. Accordingly, based on the measures of performance noted in Table 1, the sale does not appear to have been anti-competitive.

Fixed Royalty versus Sliding-Scale Tracts

One of the claimed advantages of the sliding-scale system is that it tends to promote competitive bidding on the part of the smaller firms in OCS lease sales. However, smaller company participation in Sale #43 was minimal, and only two companies submitted bids on (four different) sliding-scale tracts while not submitting any bids on the fixed royalty tracts. These results occurred despite the fact that of those tracts receiving bids, (1) the average sliding-scale tract value as estimated by GS was twice as high compared to the fixed royalty tracts, (2) three times as many sliding-scale tracts had a GS value in excess of one million dollars compared to the fixed royalty tracts, and (3) five times as many sliding-scale tracts had both a GS value and high bid in excess of one million dollars compared to the fixed royalty tracts.

In light of these observations, it is reasonable to conclude that on tracts receiving bids, the modestly higher

number of average bids on sliding-scale tracts (1.925) compared to fixed royalty tracts (1.294) resulted from the sliding-scale tracts having more favorable prospects, and participating firms "submitting" more zero bids on fixed royalty tracts.

The sum of the winning bids on sliding-scale tracts was 43% higher than the GS value. For fixed royalty tracts, the sum of the winning bids was 225% higher. To determine whether the different outcomes under the two leasing systems could be attributed to factors other than pure chance, a statistical analysis was conducted to test the hypothesis that there was no difference in the ratio of high bids to the GS valuation between the leasing systems. It was determined that, even under statistical assumptions that favored rejection, the null hypothesis could not be rejected. Hence, the noted differences in bidding behavior cannot be attributed to non-random bidding factors.

cc: Don Bieniewicz
Robert Davis
Ted Heintz
Al Powers
Tom Readinger
Sam Bae
Bill James
Holly Tomlinson

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF THE SECRETARY
Washington, D.C. 20240

May 9, 1978

Memorandum

To: Heather Ross

From: Marshall Rose /s/ MR

Subject: Some Statistical Results of OCS Sale #45

This memorandum discusses the results of Sale #45 for the two leasing systems used and for the competing bidders. To simplify the exposition, the sliding scale tracts are referred to as S tracts; the fixed (one sixth) royalty tracts are called F tracts.

In this sale, 16 tracts were offered under the sliding scale leasing system; 10 of these tracts received at least one bid. In addition, 129 tracts were put up for bidding under the fixed royalty system; 91 of these tracts received one or more bids.

The average number of bids received was 3.80 for the 10 S tracts and 2.69 on the 91 F tracts. Although the S tracts averaged about one more bid per tract compared to the F tracts, there is convincing evidence that this difference is not due to the alternative leasing systems used:

1. One S tract received 16 bids. When this tract is eliminated from the calculations, we find that the average number of bids per tract is somewhat higher on F than on S tracts.
2. Both S and F tracts have the same median number of bids—two.

3. Eighty five companies submitted single or joint bids in Sale #45. Only 46 different companies bid on the S tracts, while 84 different firms bid on F tracts. Thus, there were 39 companies bidding exclusively on F tracts, but only one firm bidding solely on S tracts.

To supplement these findings, a statistical test of the null hypothesis was conducted. This test strongly indicated that there was no significant difference in the number of bids received per tract between the two leasing systems. Accordingly, these observations tend to confirm those results obtained from OCS Sale #43, in which no noticeable increase was evident in either the number of bidders or in the number or bids owing to use of the sliding scale royalty system.

Measures of bidding success for the major and minor firms in the sale between the two leasing systems are shown in Table 1.* The majors submitted 89 percent of the high bids on S tracts, but only 67 percent on F tracts. These high bids represented 76 percent of the RMROV's on S tracts, compared to just 17 percent on F tracts. While the majors captured 73 percent of the expected quantity of producible reserves on S tracts, they won (subject to their high bids being accepted) only 39 percent of the reserves on F tracts.

Although the majors submitted 65 percent of the high bids, the tracts upon which these bids were placed repre-

* Ranked in order of annual U.S. refined product sales, the eight majors are Exxon, Texaco, Chevron (a.k.a. Standard Oil of California), Amoco (a.k.a Standard Oil of Indiana), Shell, Mobil, Gulf, and ARCO. A clever mnemonic suggested by Don Bieniewicz is the acronym MEGA-CATS.

cc: Les Silverman
Robert K. Davis
Al Powers
Ted Heintz
Maribeth Handsman
Carolita Kallaur
Don Bieniewicz
Tom Readinger
Sam Bae
Holly Tomlinson
Bill James

sented just 21 percent of the RMROV's and 41 percent of the expected quantity of producible reserves in the sale. This relatively poor level of bidding proficiency is also seen in some other measures of performance shown in Table 2. For example, in terms of the high bid per dollar of GS estimated value, the eight major firms paid $10.17 on S tracts and $19.65 on F tracts. On the other hand, the remaining "minor" firms paid only $4.01 on S tracts and just $2.03 on S tracts. Moreover, in terms of the high bid per expected barrel of producible reserves, both major and minor firms paid almost 40 percent less on F tracts than on S tracts; however, the majors paid more than three times as much in absolute magnitude on a per barrel basis.

Looking at individual performers, Tables 1 and 2 list, in order, the four firms that submitted the highest amounts of "winning" bids. Exxon, for example, submitted high bids totaling $143.8 million, and captured 11 of 14 which it bid on. These 11 tracts were estimated by GS to be worth only $18.2 million. Thus, Exxon paid $7.90 per dollar of GS estimated value, which is somewhat higher than the average figure for the sale of $5.26.

Table 1. Measures of Bidding Performance

	S Tracts			F Tracts			All Ttracts		
Firms	High Bids	RMROV	Reserves	High Bids	RMROV	Reserves	High Bids	RMROV	Reserves
Majors	89%	76%	73%	67%	17%	39%	65%	21%	41%
Minors	11	24	27	33	83	61	35	79	59
All Firms	100	100	100	100	100	100	100	100	100
Exxon	76	48	47	12	10	26	19	12	27
Mobil	—	—	—	10	3	5	9	3	5
Getty	—	—	—	9	16	9	8	15	8
ARCO	12	24	19	6	2	5	7	3	6

Table 2. Measures of Bidding Proficiency

Firm	High Bid per Dollar of RMROV			High Bid per Barrel of Reserves		
	S Tracts	F Tracts	All Tracts	S Tracts	F Tracts	All Tracts
Majors	$10.17	$19.65	$17.46	$14.71	$9.14	$9.63
Minors	4.01	2.03	2.07	4.81	2.94	2.98
All Firms	8.71	3.13	5.26	12.00	5.36	5.69
Exxon	13.83	6.04	7.90	19.53	2.52	3.99
Mobil	—	16.31	16.31	—	10.70	10.70
Getty	—	2.81	2.81	—	5.42	5.42
ARCO	4.43	17.50	11.46	7.67	6.64	6.65

EXHIBIT 15

RESPONDENTS REPLY MEMO OF JULY 14, 1980

UNITED STATES
DEPARTMENT OF THE INTERIOR
Washington

Memorandum

Oct. 31, 1977

To: Secretary

From: Deputy Under Secretary B.H.

Subject: Requests for delay of OCS Sales 42 and 43

You have received a letter from 59 congressmen, including Udall, Yates, Phil Burton, John Murphy, and others, asking that, in light of the Rules Committee action on H.R. 1614, you postpone the Jauary Georges Bank sale, and possibly the next sale as well (South Atlantic). This is likely to be only the first of a series of such requests.

I have tried to put together some background on new provisions in the bill, end all the arguments for and against, and ramifications of a decision either to delay or not to delay.

Major provisions in H.R. 1614 that cannot be accomplished under existing law

1. *Bidding systems.* Existing law restricts the sale of leases to bonus or royalty bidding. H.R. 1614 enumerates a number of other possible bidding systems,and authorizes the Secretary to use any of them, or any modifications of them, or any other bidding systems. The Solicitor's office has said we could get away with a form of net profit sharing under existing law, but everyone seems to agree that we would be challenged in court if we were to try it.

2. *Lease cancellation.* Existing law allows cancellation only for gross negligence or willful violation of lease

terms. H.R. 1614 would allow cancellation in extraordinary circumstances for environmental or safety reasons, with appropriate compensation to the lessee. This provision would be retroactive to existing leases *if* it is not changed before final passage.

3. *Pre-lease exploration.* H.R. 1614 clarifies the authority of the Secretary to conduct, contract for, or permit pre-lease exploration.

4. *Fishermen's gear compensation.* H.R. 1614 would establish a fund to compensate fishermen for damage to gear due to OCS operations. The Solicitor's office has said we cannot accomplish this through lease stipulations.

Above are things which *cannot* be clearly accomplished under existing law. There are other provisions which can, but which in 25 years, have not been implemented. We are moving on some of them, but there is still the fear among many interests, including states, that while *you* are listening to their concerns, you will not be Secretary forever. They want those provisions legislatively mandated. (The bill also streamlines the judicial review process, without restricting anyone's access to judicial relief.)

There is no question and no dispute about who was responsible for the Rules Committee's action—the major oil producers. It is a rather timely follow-up to the President's comments on their role in the Senate on the energy legislation. In my view, despite all the rhetoric about "nationalized oil" and "delays," what the big companies really dislike in H.R. 1614 is new bidding systems. If they can delay enactment of the bill past March, after the Georges Bank and South Atlantic sales, they will have bought the first three prime frontier offerings on the east coast (including Baltimore Canyon) under primarily bonus bidding. You may recall that in the Baltimore Canyon Sale, Exxon, bidding alone, won fully *one-third* of the leases sold.

Unfortunately, unless we were to delay those sales until summer, we would probably not be able to implement a complete profit sharing system, due to delays PBA has encountered.

OPTIONS

1. *Delay*

a. *indefinitely*, pending Rules Committee and/or House action

PRO:

—delay could allow us to utilize non-bonus bidding in the next two major frontier sales.

—delay could allow us to utilize non-bonus bidding in the next two major frontier sales

—a 3-5 month delay is relatively insignificant, given that it will take about 5-8 years to achieve production.

—these sales could easily be rescheduled, since there is now a six month hiatus between Sale 45 (April 1978) and Sale 65 (October 1978), and it would not decrease the number of sales in 1978, or be an administrative burden.

—the President's energy message included a strongly stated endorsement of the OCS bill as part of his energy program. A delay and appropriate and understandable statement about the reasons, would emphasize its importance.

—not having the bill in place continues the present uncertainty about the "ground rules" for both states and industry, and may influence some to seek ways for delaying the sales through litigation (which, if successful, could delay us more than 3-5 months).

—the withholding of lease sales is one of the very few economic levers the Administration alone (as

opposed to the Administration and Congress) holds over the oil industry. It would, therefore, be a way of telling the major companies that the Administration can play "hard ball," too, and would reinforce the President's comments about the companies.

CON:

—the companies will certainly accuse the Administration of delaying development.

—you have stressed the need for keeping, as much as possible, to the announced schedule.

—we might not be able to implement the new bidding systems until next summer.

b. *delay for three months giving Congress time to act*

PRO:

—it is not an indefinite delay

CON:

—it gives opponents a target date, and announces that if they can just lobby Congress until March, Interior will hold the sales

2. *Announce that you are considering postponing the sales*

PRO:

—puts industry on notice that you *may* postpone the sales until the Rules Committee sends the bill to the floor. (Note: for all of the options, it is important to stress Rules Committee action. To be defeated after vigorous airing of the issues is one thing, but to bottle the bill up in Rules and not allow the House to debate it is unconscionable).

CON:

—Once you have announced that you are *considering* such an action, pressure from industry, full page ads, etc., will be phenomenal.

3. *No delay*

PRO:

—your previously stated commitments to try to stick to a schedule would be upheld

—no one could accuse the Administration of "delaying" development

CON:

—some people will accuse the Administration of "giving away" valuable resources and contributing to anti-trust problems by utilizing bonus bidding when we know that alternative systems are in pending legislation.

4. *Announce that the next two sales will be on the basis of royalty bidding* (similar to Cook Inlet, only 100% instead of 33%)

—This addresses the bonus bidding problems (anti-trust and fair return), but we need a good analysis of the Cook Inlet results before making a decision.

—royalty bidding has several problems, including a disincentive to produce as pressure in a well decreases and the price of producing increases. It may be possible to resolve some of these problems (for example, by defining some sort of decline curve as the basis of a sliding royalty), although I doubt that it could be done by January.

Regardless of your decision on the delay question, I suggest that you recommend that the President call Representative Delaney, Chairman of the Rules Committee, and try to get a firm commitment that H.R. 1614 will be the *first* item at Rules' *first* meeting when Congress returns in January.

You should be aware that support for H.R. 1614 comes from a wide variety of interests:

Most coastal states
Consumer organizations (including the Consumer Federation of America, and Energy Action and Congress Watch (Nader))
Environmental groups
Labor (Marine engineers; oil, chemical and atomic workers, others)
Associated Gas Distributors
National Rural Electric Cooperative Association
Others

cc:

Under Secretary
Chuck Parrish
Bob Mendelson
Heather Ross

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 79-1633

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, ET AL., DEFENDANTS

AFFIDAVIT OF H. THEODORE HEINTZ, JR.

I, H. THEODORE HEINTZ, JR., having been duly sworn, state as follows:

I am an Economist serving as Assistant Director of the Office of Policy Analysis, U.S. Department of the Interior. I have been responsible for policy and economic analysis concerning a variety of OCS policies over the past four years. Along with other staff of the Office of Policy Analysis, I have been directly involved in the analysis of bidding systems and their performance and the development and testing of various bidding systems. I have been asked to respond to the Affidavit of George L. Donkin dated July 14, 1980. Mr. Donkin's July 14, 1980, affidavit references earlier affidavits prepared by him and to which I responded in an affidavit dated June 17, 1979.

HEINTZ AFFIDAVIT

1. Mr. Donkin continues to use calculations of the government's effective share (p. 2) which are not relevant to the determination of fair market value. As I have stated in my previous affidavit, the government's effective share of the eventual value of oil and gas production from OCS leases is not a correct standard for determining receipt of "fair market value for the lands leased and the rights conveyed," which is the statutory standard. Mr. Donkin's index is based

on a concept of economic value that totally ignores the role of costs. It also focuses on the value of oil and gas, as indicated by Mr. Donkin's statement about "fair value for [the government's] hydrocarbons [sic] resources" (p. 2) rather than the "lands leased and rights conveyed" as does the statute. The distinction is important because the lease transfers a mineral right, that is, the right to explore, develop, and produce oil and gas, but it does not in any way assure the lessee will actually find and produce oil and gas resources. The transaction subject to the fair market value requirement is the transfer of a mineral right, not the sale of hydrocarbon resources.

2. Mr. Donkin repeats (p. 3 LL. 12 and 20) his claim that "16⅔ percent of production value is less than the fair value of the oil and gas resources located at OCS leases in the Federal domain." (p. 3 LL 12-14)

   This claim is based on the erroneous assumption that the government's royalty receipts constitute the only value received in exchange for the mineral rights conveyed. In fact, all government leasing revenues, bonuses and rental payments as well as royalties, must be considered.

3. Mr. Donkin focuses much attention on the effects of unexpected increases in the prices of oil and gas. This discussion compounds the error of focusing on the value of oil and gas instead of the mineral right by incorporating a further error: the actual value of the oil and gas eventually produced is confused with the value of the mineral right years earlier when the lease is issued. The fair market value for any property is the price that would be paid for the property when actually sold in a market. This market value is not necessarily equal to the market value of the same property many years hence. For example,

when a real estate property is condemned, its fair market value is based on what is kown about the property and the conditions in the market at the time of its condemnation. The fact that unexpected changes in the market over a 10 or 20 year period result in a much higher or lower value does not mean that the condemnation did not provide the seller fair market value. Mr. Donkin attempts to prove that the government did not receive fair market value for leases issued in the 1950's and 1960's because of the unexpected oil and gas price increases of the 1970's. He offers no evidence with regard to the fair market value of the leases at the time they were sold by the government. The value of the leaseholds twenty years later, affected as it is by world oil prices, is not relevant to the determination of their value at the time they were sold.

4. Mr. Donkin correctly concludes that use of a higher royalty rate would provide the government with a greater share of any windfall profits that result from unexpected price increases that occur after sale of the leases. (p. 3) However, even if capturing such future windfalls were necessary to assure receipt of fair market value at the time of lease issuance, it is clear that to capture all such windfall profits, the royalty rate would need to be 100%. However no lessee would accept a lease on which he would incur exploration and development costs while keeping none of the production revenues. The government must therefore be forced to accept less than 100% of such windfall profits at best. Mr. Donkin offers no standard or approach for determining what percentage of future windfall profits would satisfy his notion of fair market value for a lease. In fact, I know of no logical basis for making a determination of fair market value based only on royalty rates and the resulting share of windfall profits. Mr. Donkin has used a standard for fair market value which is in-

correct and illogical and can have little relevance to the issue of whether the Secretary of the Interior has complied with the statutory requirements.

/s/ H. Theodore Heintz, Jr.
H. THEODORE HEINTZ, JR.
Assistant Director, Office
of Policy Analysis
U.S. Department of the Interior

Subscribed and sworn to before me, this 30th day of July 1980.

/s/ [Illegible]
Notary Public

My commission expires 3/31/83.

SUPREME COURT OF THE UNITED STATES

No. 80-1464

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.

ORDER ALLOWING CERTIORARI

Filed April 6, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 349725 504

Office-Supreme Court, U.S.
FILED
MAR 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1980

No. 80-1464

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

This case arises from administrative defiance of the 1978 statutory mandate requiring the Government to conduct a five year experimental program of OCS leasing in order to test new leasing methods designed to achieve greater diversification in lease acquisitions, more oil and gas production, and improved public revenues. By 1978 the system which Interior used exclusively under the 1953 law—cash bonus auction of 16⅔% royalty leases—had yielded little competition for the leases, and the major oil companies who acquired most of the tracts tended to stockpile rather than to develop the properties. Moreover, by 1978 bonus bid leases were yielding the Government minimal returns—only a 23% net share in the oil and gas produced (16⅔% royalty plus only 7% in cash bonuses) compared to the nearly 50% net share which has long been the result for California through the State's offshore leasing by profit share bidding instead of cash bonus bidding.

Cognizant of the defects of DOI's bonus bid leasing, Congress overhauled the OCS statute in 1978 and established a five-year program of experimentation with new leasing systems. The program was intended to compare traditional bonus bid leasing with results under new non-bonus bidding systems, particularly with profit share bidding. When nine months after the 1978 statute's adoption the necessary new bidding regulations were still not forthcoming, this suit was filed by adversely affected consumers and by California offshore oil lands lessors—the State Lands Commission and the City of Long Beach. On plaintiffs' initial injunction demand the Court of Appeals ruled in 1979 that the Government's delay in issuing the new regulations was not yet an abuse of discretion calling for judicial relief. But when another year passed and the Government had not yet even commenced promulgation of profit share bidding or other non-bonus bidding regulations, the Court below ruled on October 30, 1980 that "the day has arrived when the Secretary's continued delay is unreasonable and frustrates the essential purposes of the OCSLA." The Court of Appeals accordingly ordered promulgation of the new regulations; promulgation of the regulations is now in progress pursuant to a District Court consent order, and the regulations are due for final adoption by June.

The Court below also required "good faith experimentation" by DOI with profit share bidding during the remainder of the five-year experimental period, which reached its mid-point on March 18, 1981 but which has yet to include any non-bonus bid leasing at all. We urge hereafter that no reason arises for this Court's review, for the good faith experimentation ruling below properly vindicates multiple national interests which Congress sought to promote by the experimentation program: diversification in federal oil and gas acquisitions, improved production of oil and gas, and better returns to the public from OCS leasing.

COUNTER-STATEMENT

After rulings of this Court in the 1940s had upheld federal ownership of the outer continental shelf, Congress enacted the 1953 Outer Continental Shelf Lands Act and provided therein for alternative means of leasing. One option was the use of cash bonus bidding, by which the highest cash bidder acquires the lease and then pays the Government a fixed royalty representing a portion of the oil and gas he derives from the lease. A second alternative under the statute was leasing to the bidder offering to the Government the highest rate of return (royalty or profit share) on his oil and gas production from the lease, with a fixed cash bonus for award of the lease. It was the Government's exclusive resort since 1953 to cash bonus bid leasing which led to the enactment of the 1978 provisions mandating a five year experimentation program. It is the Government's refusal to heed the Congressional will which led to this litigation and to the ruling below.

1. *Leasing History*

Instead of royalty or profit share bidding, from the beginning in 1953 the Department of Interior chose bonus-bid leasing of OCS property with the same 16⅔% royalty rate previously used in onshore leasing. In opting for bonus bid leasing of OCS properties of uncertain but potentially enormous oil and gas value, DOI favored the preference of the major oil companies.[1] At the same time

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[1] The major oil companies from the first pressed for use of the cash auction system which most advantages them and eliminates most smaller bidders. Thus, the President of Humble Oil testified in 1949 that:

> "[1]leases should be awarded to responsible and qualified bidders upon the basis of the highest bonus payment offered. Rentals and royalties should not be subject to bidding but should be uniform and fixed in all leases . . . Selection of the successful bidder on the basis of the highest bonus payment

DOI rejected the alternative route which had already produced noteworthy benefits for the State of California. Yet, as early as 1948 testimony by Attorney General Tom Clark had pointed to the successful results of California's profit share leasing of its offshore lands and urged its federal emulation (Title to Submerged Lands Beneath Tidal and Navigable Waters: Hearings on S. 1988 and Similar House Bills Before the Senate Committee on the Judiciary and the House Committee on the Judiciary, 80th Cong., 2d Sess. at 685). California has long experienced through use of profit share bidding very high bids, and a net return representing nearly 50% of the lessees' oil and gas production (JA 39-40).[2] By contrast, under the bonus bid leasing which DOI used in some 40 lease sales held between 1953 and 1978, the United States realized only about a 35% net return on oil and gas production from its leases before the 1970s, and leases awarded since 1972 are yielding substantially less than 30%—in recent years' sales as low as 23% (JA 207; Appendix B to Plaintiffs' District Court Reply Memorandum of July 14, 1980).

The declining federal return from bonus bid leasing chiefly reflects the astronomical rise in oil and gas prices which commenced at the beginning of the 1970s; the price rises have rendered the cash bonuses bid at the front end of the leases increasingly less significant, adding con-

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offered, with rentals and royalties being fixed for all leases, is recommended because that method will assure the higher monetary return to the government as lessor and will secure more responsible operators." Conservation and Control of Submerged Coastal Lands: Hearings on H.R. 5991 and H.R. 5992 Before the House Judiciary Committee, 81st Cong., 1st Sess. at 151 (1949).

In the present case the major oil companies have repeatedly participated below as *amici* in opposition to the plaintiffs.

[2] JA references are to the Appendix in Nos. 79-1768 and 1787 in the court below. See Pet. 4a, n.7.

stantly less to the basic 16⅔% royalty rate.[3] After the oil and gas price rises commenced, Congress was made aware of the defects in the bonus bid leasing system used by DOI, an awareness that ultimately led to the enactment of the key statutory amendments in 1978.

The first manifested flaw of bonus bidding is that only the largest companies have the cash capacity to bid successfully, and they engage in little bidding against each other. In the lease sales held in the years prior to 1972 the average number of bids per tract bid upon was only 3.5 (JA 27), and over 80% of all leases were acquired by the nation's twenty largest crude oil producers (JA 30-31). For instance, in the five years from 1968 to 1972 the twenty majors acquired successively 94%, 100%, 82%, 100% and 77% of the leases sold (*id.*). These results were exacerbated in the 1970s when vast increases commenced in DOI's annual leasing of OCS properties at the same time that oil and gas prices started on their escalating course—a course which has multiplied by tenfold since 1972 the market value of crude oil and natural gas. As a consequence of rising cash bonuses for increasingly valuable federal resources sold in larger annual quantities, competition for leases further declined and major oil company domination was further enhanced. At lease sales held between 1973 and 1978, the average num-

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[3] In 1975 the impact of these price increases on DOI's cash-bonus low royalty leasing system was conceded by Interior Secretary Morton. Testifying before the Congress (JA 53) that the objective of any bidding system must be to "insure receipt of fair market value," he conceded (*id.*) that:

> "[o]n the Outer Continental Shelf, we have been collecting 16-2/3 percent of all of the production. You might say, and I think very well say, this is not a high enough percent because we really don't get true value, if, at the time the bonus is bid, oil is selling at $5 and then it goes up to $10. The 16-2/3 percent royalty is not high enough."

(Hearings on S. Res. 45 and S. Reg. 222 Before the Senate Committee on Interior and the Senate Committee on Commerce, 94th Cong., 1st Sess. at 68).

ber of bids per tract bid upon was only 2.77 and in some sales ranged as low as 1.16 (JA 27-28). Single bidders acquired a substantial portion of the leases awarded with no competition at all (JA 27); in some sales a majority of all the tracts leased were leased to single bidders.

These defects were brought to Congressional attention by a series of five Comptroller General reports issued between 1975 and 1978. They warned that given the restricted competition for DOI's bonus bid leases, there could be no assurance that the Government was recovering fair value—particularly since there was no reliable basis for predicting the actual oil and gas value of any tract.[4] The first Comptroller General report (JA 47-48) noted that increased leasing "will mean increased reliance on bid competition as the only means to insure that fair market value is received for leased resources," and that the eight largest companies were expected to secure most of the acreage as smaller companies could not be expected to bid "because of high risks and costs." The second 1975 report (JA 48) emphasized that "these are the public's resources and it is the Government's job to not give them to industry for less than they are worth," and stated again that the Government "is not doing all that it can do to reasonably insure fair return on the disposi-

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[4] Because of insufficient existing information about likely oil and gas yields, in terms of the expected bonus bid amounts there have been wide discrepancies between the Government's presale estimates of the value of the property and industry evaluations reflected in the high bids actually received. Thus, in lease sales held between May 1968 and the end of 1972, the presale evaluations by the Department of Interior amounted successively to 17%, 26%, 58%, 82% 18%, 14%, 11%, 5%, and 24% of the winning bids; in the first four lease sales of 1973 and 1974 the presale evaluations averaged 22.9%, 9.7%, 29.1% and 17.5% of the winning bids (JA 25). A recent Comptroller General report on a 1979 sale shows no change: the average of the high bids was *20 times greater* than DOI's presale estimates (Some Issues Affecting California OCS Oil and Gas Lease Sale 48, Report of May 5, 1980, at p. 26).

tion of oil and gas shelf resources." A March 1977 report on a lease sale (JA 49) warned again that "estimates of tract values were not reliable and could not reasonably assure that the public received a fair market value return from the leases," and a later 1977 report made similar points (JA 367, 369-71, 401-02). Finally, in a June 1978 report (JA 431) issued just prior to the 1978 statute, the Comptroller General warned again (JA 466) that given the absence of reliable prior evaluation of properties the bonus bid system may encourage industry to "buy very good lands for less than fair market value" and that there was "no assurance that the public received a fair market value return" (JA 463).[5]

It was thus clear by the time the 1978 statutory amendments were adopted that OCS leasing was fostering major oil company domination of federal offshore oil and gas, and that it was questionable whether the Government was receiving a fair return. In addition, it appeared that the same companies were stockpiling their federal oil and gas leases rather than developing them expeditiously (see JA 31-36). It is only these com-

[5] As the GAO explained (JA 463):

"About 60 percent of the tracts in Sale C1 receiving bids got only one or two bids. For Sale 35 and Sale 40 respectively, about 70 percent and 49 percent of the tracts bid on got one or two bids . . . .

The high percentage of one and two bid tracts in Sale C1 is, to us, the primary indicator of inadequate sale competition. As stated in our Sale 35 and Sale 40 reports, a competitive leasing program is based on the premise that competition will provide a fair market value return. When competitive conditions do not exist, however, it becomes increasingly important to have reliable tract values to use as the basis for accepting or rejecting bids. When large percentages of the total tracts in a sale receive one or two bids per tract and are minimally valued based on poor information, there can be no assurance that the public received a fair market value return for the potential resources leased."

panies who have the capacity and incentive to invest substantial cash bonuses in federal leases for future reserves rather than for present return, and the record showed the substantial non-development of their OCS leases (*id.*).[6]

2. *The 1978 Amendments*

The 1978 amendments repeatedly reflect Congressional concern about the multiple defects of bonus bid leasing. Congress provided that leasing "shall be conducted to assure receipt of fair market value for the lands leased and the rights conveyed" (43 U.S.C. § 1344(a)(4)). New provisions were added to assure competition in the industry from OCS leasing (43 U.S.C. § 1337(c)). A "due diligence" requirement was added with respect to exploitation of leases by all lessees (43 U.S.C. § 1351(h)(2)(C)). Finally, Congress provided for an experimental leasing program during a period of five years from the date of enactment (September 18, 1978), to compare the existing leasing system with new leasing systems (43 U.S.C. § 1337(a)(5)). In that respect, the statute identifies three alternative cash bonus bid leasing systems already used before the amendments, including the traditional fixed royalty system, as well as a bonus bidding system for fixed net profit share leases (43 U.S.C. § 1337(a)(1) subsections (A)(C)(D) and (F)). The statute

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[6] Major oil company hoarding has continued to this day. In a DOI release on October 23, 1980, Secretary Andrus stated: "Press accounts of statements by Shell Vice President R.H. Nanz indicate that he is still trying to peddle a myth that there has been a 'lock up' of Federal lands which has slowed development of energy resources. In fact, the foreign-owned Shell Oil Company now owns 44 leases offshore, some for a period of four to five years, on which there has been no drilling or development, and industrywide there are nearly 700 leases offshore on which there has been no drilling. Conservatively, these 700 leases, averaging more than 5,000 acres each, constitute a total of 3.5 million acres not yet drilled." The Secretary concluded that *"Credibility is strained when industry cries out for the leasing of more Federal lands, while at the same time holding millions of acres without any sign of an effort to explore those leases."*

also identifies three non-bonus bid leasing systems (subsections (B) (E) and (G)); among the latter the system which figured most in the legislative process is "fixed cash bonus with the net profit share reserved as the bid variable," the system which California has successfully used for many years. It was the Congressional intent by the experimental leasing program "to assure that adequate information is obtained as to relative advantages and disadvantages of the various bidding systems" (H.R. Rep. No. 95-1474, 95th Cong., 2d Sess. at 92).

The purpose of the experimental program to test non-bonus bid leasing was repeatedly stated in the Congressional reports. Thus, the House Report stated (H.R. Rept. 95-590, 95th Cong., 1st Sess., at 54):

> "The leases have been awarded by auction, traditionally on the basis of cash bonus bids. With the present shortage of investment capital that will prevail for many years, increasing risks of uncertainty, and the increasing integration and concentration of energy industries, there is now doubt whether cash bonus bidding remains the best system for the future. One purpose of H.R. 1614, is to authorize alternative leasing arrangements and require experimentation with them."

Thereafter (at pp. 139-140) the Report explained the new leasing provisions as follows:

> "It was the intention of the Committee that there be a clear mandate given to the Secretary to require him to use bidding systems other than the cash bonus bid. . . . By selecting the 'best tracts' for offering under bonus bid systems, or for offering under non-bonus bid systems, he could limit the ability of some companies to participate in lease sales for these 'best tracts.' To avoid such a possibility, the committee, in paragraph (6) required that, generally, he randomly select those areas to be offered under a bonus bid system and those which would be offered under a nonbonus bid system."

Additional and voluminous legislative history leaves no doubt about the key Congressional intent to mandate experimentation with non-bonus bidding, in the hope of alleviating lease monopolization and stockpiling and of improving federal returns. At the hearings and in the floor debates these themes repeatedly emerged as the focus of Congressional concern (see, e.g., Pet. 33a-34a, n. 70; 42a-44a, ns. 83-89). Thus, the House Report emphasized the testimony that "the high front-end bonuses may have created a barrier to the entry of small and medium-sized oil firms," and that "these types of bids do not, after the completion of exploitation of a lease area, provide a fair return to the Government" (H.R. Rept. 95-590 *supra*, at 138-39). Senator Jackson, a leading proponent of the 1978 amendments, testified that "the net profit-sharing approach offers the greatest or best basis of equity as far as the taxpayers of this country are concerned." Outer Continental Shelf Lands Act Amendments of 1975: Hearings on H.R. 6218 Before the Ad Hoc Select Committee on Outer Continental Shelf, 94th Cong., 1st Sess. at 371 (1975). Noting that large cash bonuses tend to exclude smaller lessees, the Chairman of the Committee of the House which recommended the 1978 amendments expressed the view that "front-end bonus bids are anticompetitive." Outer Continental Shelf Lands Act Amendments of 1977: Hearings Before the Ad Hoc Select Committee on Outer Continental Shelf, 95th Cong., 1st Sess. at 665 (1977).

Particular Congressional interest was manifested in California's profit share bidding system. Representative Miller noted that on some tracts "there would probably be little reason to require a front-end bonus bid; but, rather, one would be interested in having the oil companies bid on the basis of royalty as the City of Long Beach did in California . . ." 124 Cong. Rec. H. 488 (Feb. 1, 1978). The House Committee pointed out that "California has received about 48 percent of total gross revenues from production under so-called 'experimental' lease

terms, as compared to the 16⅔ percent the Federal government will realize from all but three of the Federal OCS tracts leased off Southern California last December" (H.R. Rep. No. 94-1084, 94th Cong., 2d Sess., at 249-250). In the light of those results, the Committee concluded that "There clearly is no reason why the U.S. Government cannot do as well for its people as foreign governments and U.S. States have done for theirs when leasing oil and gas properties" (*id.* at 250).

Finally, no less than the House reports, the Senate report made clear that the new bidding systems "are designed to reduce the front end cash bonus, increase the government's return on actual production of oil or gas, make it easier for smaller companies to enter the OCS development business, and increase the availability of funds for exploration" (S. Rept. 95-284, 95th Cong., 1st Sess., at 46). And the Report emphasized (at p. 73):

> "The basic thrust of all these new options is to reduce the reliance on large front-end cash bonuses as the means of obtaining a fair price for the public's property. The committee wants to authorize lease allocation systems that would encourage the widest possible participation in competitive lease sales consistent with receipt by the public of fair market value for its resources. The committee believes that net profits share and other arrangements can be effective in shifting Government revenue away from initial bonuses and into deferred payments made out of a leaseholder's profits based on actual production of oil or gas." [7]

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[7] The Department of Interior itself has recognized that these objectives are advanced by profit share leasing. As early as 1977 a DOI memorandum (JA 46) concluded that as compared with fixed-royalty leasing, profit sharing "generates more government receipts and simultaneously encourages higher levels of production." In 1978 testimony to the Congress (JA 68), DOI stated that "Under the profit sharing system, the Government takes a share of the profits, after the operator's investments are paid out, whenever oil and gas are produced. This can substantially reduce bonuses, and may thus improve competition."

3. *Violations of the 1978 Law*

At the time of the 1978 amendments there was high anticipation that they would give new life to OCS leasing, for Congress had been assured by the Secretary of Interior that the legislative mandate "will be a positive incentive to doing extensive and detailed background, experimentation, and followup on new bidding systems" (Pet. 33a), and he committed himself "to substantial use of bidding systems other than the cash bonus system" (Pet. 44a, n. 91). But by mid-1979 it had become apparent that even for sake of experimentation the Government was still resisting any leasing other than by bonus-bidding. Instead of promulgating regulations for profit share leasing or any new non-bonus bidding system, DOI continued after 1978 exclusively with bonus bid leasing. True, it tested a system first tried before the 1978 amendments: cash bonus bidding for "sliding scale royalty" leases, which theoretically could provide higher than 16⅔% royalty rates to the Government on very large oil and gas discoveries; but the Comptroller General has found that the DOI scale has been set so high that the royalty is unlikely ever to "slide" above the traditional 16⅔% rate (Report of May 5, 1980, *supra*, p. 6, n. 4, at 40).[8]

Under the continued exclusive use of cash bonus bidding for "sliding scale" or other pre-fixed royalty or profit share leases, *in the eleven OCS lease sales held since the 1978 statutory amendments the number of bids per tract has remained just as low as before, and the major oil companies have continued to acquire almost all the leases.* The average of bids per tract bid upon has remained at 3.0 and in some sales as low as 1.7; the twenty largest producers have acquired 81% of the tracts and in some sales 100% (see Appendix A, *infra*

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[8] DOI has long considered this system only "a variation of bonus bidding" and its leading economist termed it "redundant" for testing purposes. See exhibits 11 and 12 to plaintiffs' District Court Reply Memorandum of July 14, 1980.

p. 1a). Even worse are the results from the recent use of cash bonus bidding for fixed net profit share leases (*id.*).

When it became clear in 1979 that the Government was not testing non-bonus bidding or even issuing the necessary new regulations, this suit was filed by consumer plaintiffs and by California lessors of OCS oil and gas tracts—the State Lands Commission and the City of Long Beach. The consumer plaintiffs asserted that the unlawful failure of the Government to commence testing non-bonus bidding (and particularly profit share bidding), is injuring them by preventing diversification in federal oil and gas acquisitions and by the resulting reduction in the supply of oil and gas because of the stockpiling capacity and incentives of the major oil companies who acquire most of the cash bonus leases (JA 70). In addition, the California plaintiffs alleged competitive injury from the continuing sale of federal oil and gas lands exclusively by cash bonus bidding on terms far more lucrative to lessees than those which the State and Long Beach provide in their offshore leases, with consequent detriment to plaintiffs' leasing capacity and oil production and revenue from their existing leases (JA 71-72).

4. *The Rulings Below*

The first round in the lower courts was won by the Government. Pleading the complexity of problems in issuing new regulations, in late 1979 the Government persuaded the Court of Appeals that it was not yet an abuse of discretion that one year after the new statute's enactment regulations had not issued for the new leasing systems (see Pet. 75a).[9] Warning that the time

[9] The Court did, however, underscore the importance of the new leasing. In its opinion calling for further trial court proceedings (Pet. 96a-97a), the Court noted the conditions which evoked the 1978 provisions (Pet. 78a): "Other developments more directly pointed to inadequacies in the bidding system used in leasing OCS Lands. The dramatic increases in the price of oil and natural gas made it evident that the cash bonus-fixed royalty system of bidding

might come when further delay would constitute abuse (Pet. 97a), the Court of Appeals nevertheless declined to reverse the District Court's denial of a preliminary injunction.[10] But following the Government's judicial victory based on the "complexity" plea, it changed its stance and made clear in 1980 that it had no plans at all to issue regulations for variable net profit bidding or other non-bonus bid leasing. It confessed that no work had been initiated and that "there has been no proposal for a regulation" on profit share bidding (June 1980 deposition of DOI Assistant Director Heintz, p. 111). Thereafter, in opposition to plaintiffs' renewed request for relief the Government asserted in the lower courts that the statute permits DOI to continue exclusively by cash bonus bid leasing even during the five year experimental period. Thus, over two years after the 1978 statute's adoption the Court below found that except for a private contract for an analysis "nothing has been done as to the critical variable net profit share bidding system" (Pet. 19a-20a).

On a renewed motion by plaintiffs for injunctive relief, on September 17, 1980 the District Court declined to resolve the basic issue but on appeal the Court of Ap-

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led to a situation wherein the total royalties paid to the government were declining as a percentage of gross proceeds on wells. Several reports issued by the Comptroller General beginning in 1975 expressed the strong reservation that the cash bonus-fixed royalty system could not assure the government a fair return on its leases. In addition, those reports indicated that the cash bonus system had anticompetitive effects, leaving smaller operations, with fewer financial resources, relatively unable to compete, given the high fronted cash bonus payments and the many uncertainties associated with exploring untested areas."

[10] In its decision, the Court emphasized that Congress, in response to concerns about past leasing, had expressed a clear desire for meaningful experimentation with bidding systems other than the old cash-bonus, 1/6th royalty system. Noting that "Congress was deeply concerned with the assurance of fair market value and adequate competition in OCS leasing" (Pet. 85a), and further noting that Congress was aware of the "substantial evidence to

peals entered an opinion on October 30, 1980 rejecting the Government's position. Based on extensive analysis of the statute and its legislative history, the Court below finds the Congressional interest in non-bonus bid leasing—and particularly profit share bidding—too central to the 1978 amendments to permit the Government to ignore new non-bonus alternatives "without any testing at all" (Pet. 31a). On that score, the Court emphasizes (Pet. 41a) that:

> "Alternatives like the variable net profit share bidding option (and the work commitment bid system) are designed to reduce front end cash payment and to stimulate competition to a greater degree than the options already in place which still focus bidding on the front end cash bonus. Although we obviously cannot determine at this point whether the non-cash bonus variable systems will have the salutory effect in practice that their supporters claim, acquiring this information is precisely the objective of the Congressionally mandated experimentation with new systems."

Focusing specifically on the profit share bidding system which California has long successfully used, the Court concludes (Pet. 44a-46a) that "*we do not think it a reasonable construction of the Act that experimentation with variable net profit share bidding can be rejected.*" Accordingly, the Court has required the issuance of the non-bonus bidding regulations prior to mid-1981, to facilitate "good faith experimentation" with non-cash

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demonstrate the superiority of a profit-sharing bidding system over the cash bonus-fixed royalty option" (Pet. 85a, n. 29), the Court found that "Congress sought experimentation among bidding systems, usually through direct comparisons between cash bonus-fixed royalty bidding and other options, in order to obtain reliable information as to the relative advantages and disadvantages of the enumerated systems" (Pet. at 87a). As the Court stated, "[i]t was hoped that this testing would ultimately enable the Secretary to utilize the system or mix of options which emerged as superior" (Pet. 87a).

bonus alternatives (Pet. 38a) including a "fair test" and "fair trial" of profit share bidding (see Pet. Appendix A at 21a, 47a, 47a, n. 95, 49a).

Since the Court of Appeals ruled, the controversy concerning promulgation of the new regulations has been resolved; on December 19, 1980 the District Court entered a consent order submitted by the parties, under which the regulations for new non-bonus bidding systems are now being published for public comment (see 46 Fed. Reg. No. 43, March 5, 1981, p. 15484) and will be finally adopted by this June. With the regulations issue thus resolved, what remains is the question of DOI's good faith and timely experimentation with the profit share bidding system, as required by the Court of Appeals.

Since half of the five year experimental period has now elapsed, it is crucial that resort to non-bonus bidding commence at once. The eleven lease sales held since September 1978 have all used cash bonus bidding; DOI's promulgated leasing schedule provides for only nineteen more lease sales during the remainder of the five year period, and seven of them are scheduled between May and December of this year. Under these circumstances, the Court of Appeals concluded that any further delay in commencing experimentation with profit share bidding could irrevocably defeat the experimentation program. The opinion below (Pet. 49a) finds "a clear case of irreparable harm to appellants, and the public and private interests they represent," because delay beyond mid-1981 "would mean that experimentation with these options could only occur, if at all, in the last year or two of the five year period, upon whatever tracts remain for exploration. This circumstance would in turn raise a serious question of whether a fair test of variable net profit sharing would be possible, if use of that option were consigned to the last of five years for sales of relatively few and possibly less significant tracts." In sum, if there is not good faith experimentation in the 1981 lease sales with

non-bonus bidding, as required by the Court of Appeals, only 12 lease sales will then remain of the 30 sales scheduled during the entire five-year experimental period. Thus, the Court of Appeals correctly observed that the purpose of the statute's experimental program will be irrevocably defeated unless non-bonus bid leasing commences immediately.

We proceed to a demonstration that the ruling below properly vindicates multiple national interests which Congress has sought to further by experimentation with non-bonus bid leasing of vital public resources. Because the DOI's refusal to heed the Congressional will imperils the fundamental purposes of the statute's experimental program, the Court below has acted properly and no occasion arises for review of its ruling.[11]

REASONS FOR DENYING THE WRIT

There is no issue here presented warranting this Court's review. The primary ruling below requiring issuance of the new regulations has been met pursuant to a consent order entered by the District Court. Moreover, the alleged question concerning plaintiff's standing to sue for relief is entirely insubstantial. Finally, the lower court's requirement of good faith experimentation with non-bonus bidding is eminently correct, vindicating multiple national objectives Congress sought to promote by the five year experimental leasing program.

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[11] The continuing Executive rejection of non-bonus bidding reflects a basic difference with Congress. Whereas cash bonus bid amounts are received by the Treasury immediately, the royalty or net profits receipts on OCS leases typically flow over a period of 10 to 20 years. Thus, Administrations concerned to maximize their annual federal operating funds have favored cash bonus bidding which yields revenues during their term in office. Congress, on the other hand, has taken a longer view in the 1978 statute with an eye to the significant revenue gains expected from non-bonus bid leasing through enhanced ultimate public returns and other national interests.

1. *Regulation Issuance.* The primary question before the lower court was whether the Department of Energy was required to issue regulations for the new non-bonus bid leasing systems identified in the 1978 statute. Finding that the testing of such leasing was the central purpose of the statute's five-year experimental program, the Court below has ordered promulgation of the necessary regulations. The promulgation process is now ongoing, regulations have been published for comment, and will be promulgated finally by June of this year pursuant to a consent order entered by the District Court following the Court of Appeals' decision. The issue concerning regulation issuance is thus finally resolved.

2. *Standing.* In the court below defendants thought so little of their present standing objection that they did not even brief or argue it except as an after-thought by a post-argument submission (see Pet. 51a, n. *). Contrary to defendants' claim, the consumer plaintiffs are clearly injured by the refusal of the Government to promote more competitive leasing, and thus they are entitled to invoke the "citizens' suits" provision of the Act (43 U.S.C. § 1349 (a)). Since monopolization of federal OCS oil and gas leases by the major companies was a chief concern underlying the Congressional mandate to experiment with non-bonus bidding, to vindicate that mandate consumers have at least as much standing as did the consumers involved in this Court's ruling in *Reiter* v. *Sonotone Corp.*, —— U.S. ——; 99 S.Ct. 2326. Moreover, since the major companies who acquire most of the bonus-bid leases have a demonstrated stockpiling incentive and record (see *supra*, pp. 7-8), consumers have additional standing at a time when fuel shortages are a recurring national prospect. Thus, the Court below properly concluded (Pet. 53a) that the statute's grant of standing to parties with a legal interest which "is or may be adversely affected," includes consumers seeking to vindicate provisions "intended by Congress to foster competition and stimulate OCS development."

Moreover, the California governmental plaintiffs have even clearer standing to vindicate the Congressional mandate to test alternatives to the bonus bidding system—a system so favorable to lessees that it threatens California's capacity to lease its offshore properties on favorable terms. As long as the Federal Government continues its exclusive use of bonus bid leasing, which yields to lessees a far greater share than does the California bonus bidding system, there is detriment to the State's ability to lease its own property and to achieve production and profits on its existing leases.

Finally, there is the most immediate injury to California from those OCS lease sales wherein it is forced to be a co-participant in federal leases to prevent the draining away of its own oil and gas on a pool that lies under both the State and the Federal ownership. The statute (43 U.S.C. § 1337(g)(2)) contemplates a revenue division arrangement in such situations, with the state receiving royalties from the federal leases. That was the situation on the very first sale challenged in this suit—Lease Sale 48 held in June of 1979 (see Appendix B, *infra*, p. 2a). In Sale 53 to be held off the California coast this year the same situation again arises (see Appendix C, *infra*, p. 9a), and DOI has proposed to California an agreement providing the State "an interest in a part of the production removed by the Federal lessee" (*infra*, p. 12a). As a participant in the Federal revenues in such situations, California has the most immediate stake in DOI's use of the bidding system which Congress hoped would yield more revenue and under which the State itself has long received better returns. In short, California is losing its own resources under Federal leases let on terms to which the State is bound as a co-participant but which are far less favorable in their returns than those yielded by profit share bidding. Since the States' only protection in drainage situations is to agree to a share of the Federal revenues, it has clearest standing to complain when DOI is unlawfully continuing exclusively with

less-profitable bonus bidding instead of using the system Congress intended should increase returns to the public.

3. *Good Faith Experimentation.* All that could conceivably arise for certiorari review under these circumstances, is the ruling of the court below that good faith DOI experimentation is required with non-bonus bidding, in particular with the net profit system successfully used by California which was at the center of the Congressional interest in experimentation. The Court's ruling (Pet. 44a-46a) that "we do not think it a reasonable construction of the Act that experimentation with variable net profit share bidding can be rejected," is supported by extensive legislative citations leaving no doubt about the correctness of its conclusion. To allow the five-year experimental program to proceed to its end exclusively on the basis of bonus-bid leasing, with no testing of profit-share bidding or any other non-bonus bidding system, is to defeat the central Congressional intention underlying the statute's experimental program. That intent was expressed over and over by the witnesses, by legislators in the floor debates, by the committee chairmen and leading sponsors, and by the House and Senate reports (see *supra*, pp. 9-11).[12] The Congressional will is too plain to permit

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[12] It is noteworthy that even the present Secretary, petitioner herein, has recognized the defects of cash bonus bidding. At a 1975 confirmation hearing Mr. Watt gave the following response to the question on this issue:

> Q. "It has been suggested that substantial new natural gas production is possible from federal lands. However, many smaller independent companies have not been able to engage in the development of oil or gas from federal lands because of the high entry barriers erected by the current system of bonus bidding. Would you favor a revision in existing federal leasing policies to a royalty bidding or some other system in order to permit more than just the largest oil companies to participate in the development of such resources?"
>
> A. *"Yes, I believe we should consider other methods of leasing the Federal lands because the huge front-end payments do*

administrative nullification of a provision characterized by the House report as "*a clear mandate given to the Secretary to require him to use bidding systems other than the cash bonus bid.*" As the Senate emphasized, bidding alternatives which should bring in "more independent producers" are "certainly worth trying on an experimental basis" (S.Rep. 95-284, 95th Cong., 1st Sess. at 47).

The Government nevertheless urges that Congress left "discretion" to the Secretary in his operation of the experimental program. But discretion cannot be given a "plain meaning" which renders meaningless the subject to which it attaches; administrative discretion cannot be so absolute as to nullify the central reason why the experimental program itself was mandated by the statute. DOI's refusal to test any non-bonus bid system at all—and particularly the one in which Congress was the most interested—is an abuse which undercuts the core purpose of the experimentation program and constitutes clear *indiscretion*. As the Court below points out (Pet. 32a-33a), Congress rejected an amendment that would have given the Secretary the absolute discretion he now claims. And as the Court also notes (Pet. 44a, n.91), the 1978 statute was enacted only after repeated Administration assurances that there would be "substantial" resort to non-cash bonus bidding. Indeed, the unlimited discretion claim defendants advance is precisely the one which the Congress rejected because it had permitted major oil companies to dominate the choice of bidding systems. As stated in the House report (H.R. Rep. 95-590, 95th Cong., 1st Sess., at 103):

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limit competition and restrict the financial capabilities of the successful bidding companies."

(Hearings before the Senate Committee on Commerce, September 8, 1975, on James G. Watt to be a Member of the Federal Power Commission, at 372).

> "It is today's reliance, and tomorrow's dependence on OCS resources that demonstrates the need to reform OCS procedures and to provide new protections.
>
> The committee found that the present law's grant of total discretion to the Secretary led to a situation where the petroleum industry had until recently, as will be discussed later, a too dominate voice in the setting of policy . . . Under the present law's bid system, representatives of the American Gas Association testified the larger energy companies were able to totally dominate leasing."

The Court below has rejected only DOI's position that no non-bonus bidding leasing is required at all, leaving it to administrative discretion to choose "when and how much" net profits bidding should be utilized (Pet. 47a, n. 95). The DOI's present claim of an absolute discretion to refuse to test non-bonus bidding—which Congress hoped would diversify lease acquisitions—nullifies the very reforms which Congress advisedly enacted. The statute does not support defendants' claim of unlimited discretion to reject non-bonus bidding even on an experimental basis. On the contrary, as stated by the Conference Committee in explaining the statute's annual percentage limitations on experimentation: "Bidding systems *other than bonus bidding* . . . are to be utilized in at least 20 percent and not more than 60 percent of the tracts offered for leasing in all OCS areas during each of the next 5 years" (H.Rept. 95-1474, 95th Cong., 2d Sess. at 92, emphasis in original).[13]

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[13] Moreover, the statute provides no discretion at all to the Secretary to conduct leasing in a way that does not "assure receipt of fair market value" (43 U.S.C. § 1344(a)(4)). The plain meaning of the statute's "fair market" value requirement compels at least the testing of the system which appears to yield far higher public returns when it gears returns to actual oil and gas production instead of a gamble on cash-bonus bids—a gamble which few companies can make and few do make under cash-bonus bidding.

* * * *

The lower court's ruling carries out multiple and vital national interests which Congress sought to vindicate by the 1978 amendments. Before the 1978 statute bonus-bid leasing had resulted—as it has since (see Appendix A, *infra*)—in the acquisition of almost all the leases by the major oil companies, in the restriction of oil and gas recovery due to those companies' stockpiling tendency, and in absence of any assurance of fair public returns for resources worth vast billions. The House Committee noted that under the cash bonus bidding system "in order to win a lease, a company must have vast amounts of capital," which may "reduce competition for offshore leases to the major oil companies and reduce the public return for resources" (H.R. Rep. 95-590, 95th Cong., 1st Sess. at 47). As the Congressional reports emphasized (see Pet. 30a-31a, ns. 66, 67), it was hoped that profit share bidding will "increase competition for offshore leases and secure higher returns to the public Treasury," and will also "increase ultimate resource recovery." The statute itself (43 U.S.C. § 1802(2)) identifies the same three objectives. If the testing of profit share bidding would promote only one of them it would be significant enough, but when all three goals are served by experimentation with non-bonus bidding then the strongest public interests support the ruling below.[14]

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[14] Conceding that the opinion below is capable of a quite narrow reading, petitioners nonetheless claim that they may be bedeviled by "considerable further litigation" of an unspecified nature. This is less a challenge to the ruling below than to some imagined future decision, for which the present ruling is given the broadest possible reading. But petitioners did not elect to seek a clarification of the Court of Appeals' opinion or to seek a rehearing from the panel or en banc to resolve alleged "uncertainties," which are more imagined than real. Moreover, petitioners conjure unspecified "delays and disruptions in the orderly development of our OCS oil and gas revenues" (Pet., p. 16). But, as

Moreover, since the Government's petition was filed in this Court it has acknowledged that profit share bidding may in fact advance the Congressional objectives. The proposed profit share bidding regulation published in the Federal Register March 5, 1981 (see *supra*, p. 16) states that "the proposed variable net profit share system would reduce initial cash bonus payments" (p. *15486*), which was exactly what Congress intended. In addition, the regulation states (p. *15487*) that profit share bidding "*is designed to encourage more participation in OCS lease sales by a more diverse range of firms*," and that "*the proposed regulation should lead to increased competition.*" Moreover, the alleged problem of excessively high profit share bids (cf. Pet. p. 12, n. 13) is now seen to arise only in "some situations," and the proposed use of a variable capital recovery factor is expected to discourage speculative bids (p. 15486). Finally, on March 2, 1981 the Department of Interior publicly announced that OCS sale A 66 scheduled for July, 1981 will include specified tracts offered for sale by profit share bidding.

Thus, the Government itself now describes profit share bidding as promising, and likely to further major objectives which Congress identified in requiring a five year period of experimentation. We suggest that under all these circumstances there is no basis for review of a rul-

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the history of this case readily demonstrates, the lower courts have been extremely reluctant to interfere with development of OCS reserves, denying injunctions against specific lease sales in order to give petitioners every opportunity to meet their statutory obligations. Even when it became clear that petitioners were not going to experiment at all with non-cash-bonus systems, despite previous warnings from both the district and appellate courts, the Court of Appeals refused to grant an injunction against three 1980 lease sales, instead directing the promulgation of regulations prior to mid-1981. In light of this demonstrated restraint, it is fanciful to predict that any future lease sales would be delayed if petitioners now implement the experimental program in good faith.

ing which properly carries out the expressed Congressional purpose, and in so doing promotes multiple national interests: diversification of OCS oil and gas acquisitions, recovery of more oil and gas, and better returns from the sale of public resources.

CONCLUSION

It is respectfully urged that the petition should be denied.

Respectfully submitted,

JOSEPH L. RAUH, JR.
JOHN SILARD

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Attorneys for Respondents

APPENDICES

APPENDIX A

DETAILS ON LEASE SALES HELD SINCE SEPT. 1978

Sale #	Sale Date	Bids Received Per Tract Offered	Received Bids Per Tract Bid On	% Tracts Receiving Single Bids	Tracts Acquired by Top 20 Producers
65	10/31?78	0.7	1.8	57%	89%
51	12/19/78	2.3	3.4	26%	77%
49	2/28/79	0.7	1.7	52%	68%
48	6?29/79	0.8	2.0	47%	95%
58	7/31/79	2.6	3.6	34%	73%
58A	11/27/79	2.6	3.4	26%	79%
BF	12/11/79	1.3	2.5	28%	96%
42	12/18/79	1.6	2.6	29%	88%
A62	9/30/80	2.6	3.4	29%	76%
55	10/21/80	0.3	1.7	59%	100%
62	11/18/80	3.3	3.6	24%	85%
	Total	1.7	3.0	34%	81%

DETAILS OF FIXED PROFIT SHARE TRACTS OFFERED AT LAST THREE LEASE SALES

Sale #	Sale Date	Received Bids Per Tract Offered	Received Bids Per Tract Bid On	% Tracts Receiving Single Bids	% Tracts Acquired by Top 20 Producers
A62	9/30/80	1.8	2.4	30%	84%
55	10/21/80	0.4	1.8	56%	100%
62	11/18/80	2.7	3.0	35%	74%
	Totals	1.1	2.4	40%	85%

*Source: OCS Statistical Summary 1978-1981, Department of Interior.

APPENDIX B

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF THE SECRETARY
Washington, D.C. 20240

Mar. 30, 1979

Honorable Edmund G. Brown, Jr.
Governor of California
State Capitol
Sacramento, California 95814

Dear Jerry:

One of the purposes of the 1978 amendments of the Outer Continental Shelf (OCS) Lands Act is to protect the interests of affected coastal States. Section 8(g) of the amended statute accomplishes this with regard to Federal proposals to lease within 3 miles of the seaward boundary of a State. It requires that when hydrocarbons occur in pools or fields underlying the boundary between areas of Federal and State jurisdiction, a fair and equitable division be made of revenues generated by a Federal lease in such an area.

In accordance with the terms of the statute, specifically section 8(g)(2), I propose that, for the proposed Sale #48, the interests of the State of California be protected by applying the terms of the enclosed agreement. This agreement is based on conversations with officials of several coastal States, including staff of the California State Lands Commission. It is designed to help assure that, when oil and gas are extracted as a result of a Federal lease from a reservoir underlying the seaward boundary of the State of California, the hydrocarbons and the resultant revenues are fairly and equitably allocated between the Federal and State jurisdictions. This would

be done by unit agreements to which the lessees of both the State and the Federal Government subscribe. In the event unit agreements are not possible or feasible, for whatever reasons, the Federal lessees would be prohibited from conducting operations within a specified distance of the State's boundary. The distance to be used is that which California currently uses in regulating its lessees' operations near lease lines.

I believe that such an agreement not only satisfies the provisions of the statute to protect State interests but, when unit agreements are entered into, also has the added advantages of preventing the construction of unnecessary facilities and realizing the most efficient production of oil and gas.

The statute, in section 8(g)(3) authorizes a maximum of 90 days for you to indicate whether you would accept or reject such an agreement before I can proceed with any leasing of the affected tracts. To help realize the timely production of much needed oil and gas, I request that you respond to this proposed agreement as soon as is practicable but within 60 days if possible.

For Sale #48, proposed for late June 1979, 36 tracts of the 148 remaining in the proposed sale lie within 3 miles of California's seaward boundary. A list of these tracts is enclosed. This list indicates that, on the basis of current information, nine have geologic structures underlying the Federal-State boundary. Of these nine tracts, six have State leases opposite the Federal areas.

While the proposed agreement would apply to any pool or field found to underlie the boundary, this analysis of geologic structures indicates the probable extent of the areas that may contain reservoirs to which the proposed agreement would apply.

I am confident that the State's interests would be protected and oil and gas production would be enhanced if

you were to accept this offered agreement. I hope to hear from you in the near future.

Sincerely,

/s/ [Illegible]
Acting Secretary

Enclosures

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
Washington, D.C. 20240

[SEAL]

Sept. 4, 1980

Mr. William F. Northrop
Executive Officer
State Lands Commission
1807 13th Street
Sacramento, California 95814

Dear Mr. Northrop:

I am writing to continue the discussions on an agreement for the division of revenues as authorized under section 8(g) of the OCS Lands Act, as amended (the Act).

You stated in your June 14, 1979, letter to Governor Brown, which commented on a proposed agreement by the Department of the Interior and which he forwarded to us, that the information on the geology and other aspects of the areas under discussion should be available prior to the consummation of an 8(g) agreement. An agreement drafted in accordance with section 26 of the Act and tailored to include sharing of information for purposes of section 8(g) has been forwarded to Governor Brown. A copy of the package of materials sent to him is enclosed. When California subscribes to the statutory conditions for sharing geological and geophysical information, I believe it will be possible to arrive expeditiously at an agreement on areas which may be potentially productive.

I believe that the changes you proposed to the agreement suggested by the Department should not prove to be major points of difference between us. I have enclosed draft agreements, one for sale #48 and the other to serve for

future sales that may be held offshore California, which appear to accommodate most of your suggestions and offer compromise positions where necessary.

For sale #48 the changes to your suggestions are as follows:

—The introductory material has been updated to reflect that sale #48 has taken place.

—Paragraph 1 has been edited slightly for clarity and the provision that the State shall use available legal authorities to require a State lessee to enter into a production unit, as well as encourage the lessee to do so.

—Paragraph 2—The distance a producing well can be positioned from the Federal-State boundary, absent a unit agreement, is the subject in this paragraph. The Department believes that 500 feet is more than adequate to prevent drainage of State lands, and California appears to want additional protection in the event 500 feet is not a sufficient distance.

In preparing for sale #48, held on June 29, 1979, stipulation 13 was added to leases. This stipulation, requiring a 500-foot buffer to be observed to prevent draining of State lands absent unitization or approved offset wells, is now a part of the lease contract for the 16 section 8(g) tracts leased. The Governor's rejection of the agreement, offered on March 30, 1979, was received on June 25, 1979. By then it was too late to change the terms and conditions of the lease sale without significant delays.

The paragraph in the proposed agreement for sale #48 recognizes the existing sale #48 stipulation and lease terms. The proposal by California to make the area where drilling may be prohibited of an undetermined size, to be agreed to after a lease is issued, would not be possible for sale #48 tracts where the contract terms have been agreed to. As discussed below, in connection with our proposal for possible future leases off California, the State's desire for additional protection is accommodated.

—Paragraph 3—The Department of the Interior does not object to a lessee entering into a unit agreement with the State as a carried, non-operating interest owner of the unitized lands. However, California would need to assume an equitable share of the costs, as well as of the revenues. This paragraph has been drafted to reflect this balance, and to specify more clearly the meaning of such agreements. The phrase "compensatory agreement" has not been used since the unit agreement would in fact serve that function.

—Paragraph 4—Rates of payment to California are necessarily subject to the terms of unit agreements. This paragraph has been reworded and generally incorporates California's suggestions as to the payment of revenues when production units are established. However, the State suggested requirement for payment on the basis of any lease issued on State lands has not been included. This provision is redundant since the unit agreement provided for would, when entered into, necessarily incorporate relevant provisions of an applicable State lease.
A provision has been added specifying that payment in value or kind is authorized.

—Paragraph 5—This paragraph was removed by California from our original proposed agreement. It is meant to assure that there is no confusion caused by mistaken expectations when offset wells are the procedure used to protect California's interests. This paragraph has been reworded to try to assure that its meaning is clear as to when the conditions for division of revenues have been satisfied.

For future sales, the same agreement is proposed as for sale #48 with a variation in paragraph 2. The better to assure the State that drainage does not result when a unit agreement is not consummated, the Department is prepared to constrain Federal lessees from operating within

750 feet of the State boundary. Again, while the Department considers 500 feet adequate to prevent drainage given the geology off the California coast and the viscosity of hydrocarbons in that part of the Outer Continental Shelf, a distance of up to 750 feet could be agreed to by the Department and the State as being necessary. Such an arrangement would put potential lessees on notice as to the extent of a leasehold on which operations would not be allowed, while satisfying the basic condition of protecting the State's economic interests. All other parts of the agreement are identical to those proposed for sale #48.

I hope that these few changes are satifactory and that we can, in the very near future, complete our discussions and enter into an 8(g) agreement. Your early response to this matter would be most welcome and appreciated.

Sincerely,

LARRY E. MEIEROTTO
Assistant Secretary—Policy, Budget and Administration

Enclosure
cc: Governor Brown

APPENDIX C

[APPEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF THE SECRETARY
Washington, D.C. 20240

Feb. 17, 1981

Honorable Edmund G. Brown, Jr.
Governor of California
Sacramento, California 95814

Dear Governor Brown:

In accordance with the provisions of section 8(g) of the Outer Continental Shelf Lands Act, as amended, I offer you an opportunity to enter into an agreement for the fair and equitable division of revenues from specified Federal leases. This section of the Act requires that you have ninety days to elect whether to enter into such an agreement on the division of lease revenues generated within 3 miles of the State's seaward boundary. I am writing at this time in order to assure that the provisions of the statute will have been met if lease sale #53 does occur in May of this year. While the final decisions on lease sale #53 have not been made, your early reply to this revenue sharing proposal would allow time to make any necessary changes to lease documents prior to the publication of the final Notice of Sale.

The attached proposal is identical to the one sent to Mr. Northrup in September for comment. I understand that subsequent conversations between Interior and State Lands Commission staffs touched on our ongoing attempts to find a basis for agreement with the State of Louisiana for similar revenue distributions. You may choose to await the resolution of those proceedings before entering

into an agreement binding on California. In any event, I would appreciate your views on the attached proposal at your earliest convenience.

Sincerely,

James G. Watt
Secretary

Attachment

AGREEMENT

BETWEEN THE UNITED STATES DEPARTMENT OF THE INTERIOR AND THE STATE OF CALIFORNIA

It is the purpose of this Agreement to set forth a means of implementing Section 8(g)(2) of the Outer Continental Shelf (OCS) Lands Act, as amended, 43 U.S.C. 1337, as to tracts off the coast of California.

With respect to tracts or portions of tracts which may be leased by the Department of the Interior in OCS Lease Sales #53 on May 27, 1981, which lie within three miles of the seaward boundary of the State of California and which contain one or more oil or gas pools or fields underlying both the Outer Continental Shelf and lands subject to the jurisdiction of the State, the following procedures shall be followed by the Secretary of the Interior and the Governor of California.

1. If the State's portion of such a common oil or gas pool or field is under lease by the State, the State shall require its lessee, to the extent permitted by law, to enter into a production unit and unit operating agreement (herein "unit agreement") with the United States' lessee for that oil and gas pool or field, for the fair and equitable allocation of the oil and gas resources extracted and of the associated costs of drilling, completion, and operation. If such requirement is not permitted by law, the State nevertheless will encourage its lessee to enter into such a unit agreement. If the State lessee is so required or, in the absence of legal requirement, is willing to enter into such a unit agreement, the Department of the Interior shall require its lessee of that oil or gas pool or field to enter that unit agreement for the said oil or gas pool or field. The term "oil or gas pool or field" is agreed to

mean a reservoir which contains oil, gas, or hydrocarbon condensates, singly or in combination.

2. If a State lessee cannot be required and is unwilling to enter into a unit agreement, as outlined in Paragraph 1, the Department of the Interior nevertheless shall not allow a well to be operated for production by the Federal lessee with its well bore in the producing intervals closer to the seaward boundary of the State than the distance to be agreed to between the State and the Department, based on analysis of pertinent site-specific data; except that in no event shall the agreed distance be further than 750 feet from the seaward boundary of the State. In the event the State permits production from the lands subject to the jurisdiction of the State from a well for which the bore is closer to the seaward boundary of the State than the distance specified in this Agreement, the Federal lessee shall also be allowed to produce from offset walls in the area of Federal jurisdiction equally close to the boundary.

3. If the portion of a common oil or gas pool or field which is under State jurisdiction is not under State lease when the area under Federal jurisdiction is leased, the Department of the Interior shall require the Federal lessee to enter into a unit agreement with the State, by which the State shall be a carried, non-operating owner with an interest in a part of the production removed by the Federal lessee. The State's equitable share of costs shall be recovered by the Federal lessee only out of the State's equitable share of production or revenues from production. If the State is not legally authorized to enter into a unit agreement, or a unit agreement is not possible for any other reason, including inability of the parties to agree upon its terms within a reasonable time, the Department of the Interior shall require its lessee to conform to the same limitations specified in Paragraph 2. If the State subsequently leases lands containing a common oil or gas pool or field, a unit agreement for produc-

tion shall be entered into. Federal and State lessees shall be required to participate in such an agreement by applicable lease terms, regulations or statutes.

4. When production units are established for pools or fields underlying both the Outer Continental Shelf and lands subject to jurisdiction of the State, it is agreed that revenues shall be paid to the State of California as follows:

(a) Production shall be allocated on the basis prescribed in unit agreements and,

(b) Revenues payable to the State of California for production allocated to State lands shall be determined by the application to such production of a rate of payment specified by the terms of a unit agreement entered into in accordance with the provisions of this Agreement.

(c) The manner of payments, whether in value or in kind, shall be determined by the terms of applicable unit agreements.

A unit agreement pursuant to this Agreement shall be the basis for assuring fair and equitable allocation of production, costs and revenues when drainage of State lands occurs from Federal lessee activities.

5. When no unit agreement has been consummated for an oil or gas pool or field underlying both the Outer Continental Shelf and lands subject to State jurisdiction, it is agreed that the constraints imposed on Federal lessees by the Federal Government as to distances of well bores from the seaward boundary of the State, in accordance with paragraphs 2 and 3 above, protects the State of California from any loss of revenue or production as a result of Federal leasing and, it is further agreed, on

division of revenues generated from such leasing is appropriate.

James G. Watt Secretary of the Interior Feb. 17, 1981	_____ Governor of California
_____ Date	_____ Date

Office-Supreme Court, U.S.
FILED
MAR 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1464

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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In the Supreme Court of the United States

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REPLY MEMORANDUM FOR THE PETITIONERS

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1. Respondents' counter-statement contains many factual assertions upon which they base their contention that the 1978 Congress found cash bonus bidding defective and, accordingly, required experimentation with alternative systems that do not involve any cash bonus bid.[1] But, at this stage, these are bare allegations. The courts below made no factual findings, since this case was decided on motions for summary judgment and a preliminary injunction. Moreover,

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[1]For example, respondents make assertions concerning the percentage returns to the Government from the cash bonus bid-fixed royalty system (Br. in Opp. 1, 4); the numbers of bidders for tracts (*id.* at 5-6); the acquisition of leases by the top 20 oil companies (*id.* at 5, 23); California's experience with variable net profit share bidding (*id.* at 4, 9, 13, 19); and the conclusions of the General Accounting Office relating to competition and fair return to the Government (*id.* at 6-7, 12). Petitioners dispute the accuracy or implications of these facts.

Congress was informed of most of these allegations during the consideration of the 1978 Amendments (*e.g.*, H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 103-121 (1977)), and nevertheless Congress refused to conclude, as respondents do, that the traditional bidding system was unsatisfactory. Instead, it rejected respondents' recommendation (*id.* at 117) for severe restrictions on the "use of cash bidding" and required the use of the traditional system on at least 40% of all new lease sales (43 U.S.C. (Supp. III) 1337(a)(5)(B)). Respondents simply seek to obtain in the courts what they were unable to obtain from Congress.

To be sure, respondents are not deterred by the congressional rejection by their arguments. Although they have not suggested any alternative interpretation of the clear statutory language cited in our petition, they invoke legislative history as indicating acceptance of their views. The flaw in respondents' case, however, is the erroneous premise that the references in the legislative history to "bonus bidding" or "cash bonus bidding" comprehend all bidding systems having a cash bonus as a bidding component. In fact, as noted in our petition (Pet. 14-15), most such references are to the traditional cash bonus bid-fixed 1/6 royalty bidding system. Respondents thus distort criticisms of this traditional system as applying to *all* bidding systems having a cash bonus as the bidding component.

2. Respondents contend (Br. in Opp. 18, 24) that there is no need for further review of this case because the Departments of Energy and Interior have agreed to promulgate the necessary regulations and to utilize profit share bidding. But, as the public announcements on which respondents rely make clear, the actions of those Departments have been taken only under the complusion of orders issued in the instant action (46 Fed. Reg. 15484, 15462 (1981)).[2] Because

[2]The Department of the Interior's tentative decision to use the alternative bidding system at the proposed lease sale for OCS Lands in the

the lower court's orders have not been stayed, petitioners have had no choice but to proceed to implement them. That obedience to outstanding orders should not be taken as the exercise of the discretion granted by the statute.[3] Instead, both Secretaries continue to urge the Court to grant this petition.

3. In our standing discussion, we noted in our petition that the governmental respondents had failed to allege any specific state leasing activities carried on or to be carried on in the future that will be harmed by the challenged leasing programs. They have still failed to do so, or to establish a nexus between federal experimentation with non-cash bonus bidding systems and greater returns to California from its leasing operations. The governmental entities have accordingly failed to establish their standing to bring this case.[4]

The private parties fare no better. In their opposition, they rely on injuries caused by the alleged "stockpiling" of leases by oil companies (Br. in Opp. 18). But a principle characteristic of the traditional cash bonus bid-fixed royalty system is that it is the system most likely to encourage

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Gulf of Mexico in July 1981 expressly reserves the final decision on the use of the system until after this Court has ruled on this petition (46 Fed. Reg. 15463 (1981)).

[3]Moreover, as noted in our petition (Pet. 16), it is not clear from the decision below whether the Departments may be required to issue more regulations and conduct further experimentation than is presently contemplated. In this connection, we note that on March 13, 1981, the district court ordered "good faith experimentation with non-cash bonus leasing such as leasing under a variable net profit share bidding system" (App., *infra*, 1a).

[4]In addition, it is at least anomalous that the governmental entities base their standing on the argument that the federal bidding systems attract too many bidders, thus impairing California's efforts to lease state lands, while the private respondents assert that they are injured because the same federal bidding systems attract too few bidders to induce adequate competition for federal leases.

the rapid exploration and development of the leaseholds.[5] Thus, there is no nexus between the injury from stockpiling asserted by the consumer respondents and the relief they request.

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1981

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[5]The high lease acquisition costs under the traditional system tend to induce lessees to conduct operations promptly in order to recoup their costs. In contrast, the relatively low acquisition costs and higher contingency costs of the alternative systems are less apt to encourage rapid development. See Pet. 12, n.13.

DOJ-1981-03

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1633

Energy Action Educational Foundation *et al.*

Plaintiffs

v.

Cecil D. Andrus, Secretary of Interior, *et al.*

Defendants

Filed: Mar. 13, 1981

JUDGMENT ON FIRST CAUSE OF ACTION

Plaintiffs having moved for summary judgment or, in the alternative, for preliminary injunction under the first cause of action of the complaint, asserting violation of the Outer Continental Shelf Lands Act because of defendants' failure to issue regulations for leasing by variable net profit share and other non-cash bonus bidding systems and their continued leasing without recourse to non-cash bonus bidding;

and upon review of this Court's denial of plaintiffs' motion the Court of Appeals for the District of Columbia Circuit having issued on [*sic*] Opinion and Judgment on October 30, 1980, which upheld plaintiffs' legal contention;

Now, therefore, it is hereby ordered, adjudged, and decreed that:

1. The Court finds and declares that during the ongoing 5-year program of experimenting with bidding systems for OCS leasing defendants have a legal duty to undertake good faith experimentation with non-cash bonus leasing

such as leasing under a variable net profit share bidding system.

2. The Court finds and declares that defendants' aforesaid legal duty requires them to promulgate additional bidding system regulations in accordance with the Order previously entered by this Court.

3. Plaintiffs are awarded their costs under the first cause of action. Award of reasonable attorney's fees for work conducted in regard to first cause of action is appropriate under 43 U.S.C. 1349(a)(5) at a time and in an amount to be determined by further appropriate proceedings.

4. This Order grants judgment on the first cause of action; the Court reserves action on the remaining causes of action pending completion of discovery and appropriate further proceedings.

/s/ Norma Holloway Johnson

Norma Holloway Johnson
United States District Judge

Dated: March 13, 1981

Office-Supreme Court, U.S.
FILED
JUN 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1464

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether consumers of oil and gas and state governmental entities that own off-shore oil and gas lands have standing to challenge the federal government's selection of bidding systems for lease sales of oil and gas rights in federal submerged lands on the Outer Continental Shelf.

2. Whether Section 8(a) of the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. (Supp. II) 1337(a), enumerating specific bidding systems for lease sales of oil and gas rights on the Outer Continental Shelf, imposes any obligation on the Secretary of Energy to promulgate regulations for any particular experimental system or the Secretary of the Interior to use any such system in actual lease sales.*

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* The named defendants in the district court and appellees in the court of appeals were Cecil D. Andrus, who was Secretary of the Interior, James R. Schlesinger, who was Secretary of Energy, and the United States of America. Because Secretary Watt and Secretary James B. Edwards are the successors to Secretaries Andrus and Schlesinger, we have substituted them as federal parties to this suit, pursuant to Rule 40.3 of the Rules of this Court.

The named plaintiffs in the district court and appellants in the court of appeals were Energy Action Educational Foundation, Consumer Federation of America, Consumer Energy Council of America, Michigan Citizens Lobby, Arkansas Consumer Research, Inc., Service Employees International Union, International Association of Machinists, Citizen/Labor Energy Coalition, Texas Consumer Association, M. James Doling, Paul Casagrande, Kathleen F. O'Reilly, California State Lands Commission, and City of Long Beach.

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No. 80-1464

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-54a) and the district court (Pet. App. 57a-73a) are not reported. An earlier opinion of the court of appeals in this case (Pet. App. 75a-100a) is reported at 631 F.2d 751.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1980 (Pet. App. 55a-56a). The petition for a writ of certiorari was filed on February 27, 1981, and was granted on April 6, 1981 (App. 270). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. (Supp. II) 1331 *et seq.*, are reprinted in Pet. App. 101a-106a.

STATEMENT

In this action, certain consumer groups and state governmental entities seek to compel the Secretary of Energy to issue regulations for, and the Secretary of the Interior to use, various bidding systems in awarding leases for oil and gas exploration and development on the Outer Continental Shelf (OCS).

1. This Court determined in *United States* v. *California*, 332 U.S. 19 (1947), *United States* v. *Louisiana*, 339 U.S. 699 (1950), and *United States* v. *Texas*, 339 U.S. 707 (1950), that the federal government, rather than the coastal states, has paramount rights over the marginal seas. Congress thereupon enacted in 1953 the Submerged Lands Act, ch. 65, 67 Stat. 29, 43 U.S.C. 1301 *et seq.* and the Outer Continental Shelf Lands Act, ch. 345, 67 Stat. 462, 43 U.S.C. 1331 *et seq.*, to cede the three mile coastal belt of submerged lands to the states and to provide for the leasing to private industry of mineral resources in the more seaward area remaining subject to federal jurisdiction, the OCS.[1]

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[1] The OCS includes all submerged lands of the shelf lying seaward of the areas ceded to the coastal States by the Submerged Lands Act, "and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. 1331(a). See Pet. App. 76a-77a n.2.

The OCS Lands Act empowered the Secretary of the Interior to lease tracts for the exploration and development of mineral resources, including oil and gas, and directed him to establish and administer a leasing program. In the 56 oil and gas lease sales held from 1954 through 1980, 3,919 leases have been issued covering approximately 19.03 million acres.[2] Approximately 2,250 of these leases are still in force and over 1,000 of them are producing oil and gas. Hydrocarbon production from the OCS is a significant element in our national energy supply. About 5.3 billion barrels of oil and 50 trillion cubic feet of natural gas have been produced from the OCS.[3] Moreover, production of oil and gas from the OCS is highly beneficial to the U.S. economy because it is significantly less costly than the imported oil it replaces. The Federal Government receives, and can expect to receive, substantial income from the OCS leasing program in the form of bonuses,[4] royalty and profit share payments,[5] and corporate taxes. For example,

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[2] The lease sales held under the 1953 Act involved tracts located primarily in the Gulf of Mexico off the coasts of Louisiana and Texas; some leases were sold on tracts off the coast of Southern California. More recent lease sales have included tracts in the "frontier areas", the Atlantic and offshore Alaska.

[3] Total OCS production currently provides about 12% of domestic oil production and 27% of domestic gas production (Pet 17 n.22).

[4] Bonus payments from 1954 through 1980 totalled approximately $30.7 billion.

[5] Production royalties from OCS leases totalled approximately $10 billion in the period 1954 through 1980. No profit share payments have been received to date.

in calendar year 1980, the federal treasury received approximately $6.2 billion in direct lease revenues.[6]

The 1953 OCS Lands Act required the leases to be sold on the basis of sealed bids, under either of two bidding systems: The Secretary of the Interior could, in his discretion, either establish a fixed royalty of not less than 12½% to be paid when the oil or gas was produced, and require bidding on the size of a cash bonus to be paid at the time of the lease award, or he could fix the cash bonus, and require bids on the size of the royalty (43 U.S.C. 1337(a)). Virtually all the tracts were leased prior to the 1978 Amendments on the basis of a cash bonus bid with a 16⅔% fixed royalty.

In reaction to a number of factors, including particularly increasing concerns over the national dependence on imported oil (H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 89 (1977); 43 U.S.C. (Supp. II) 1802), the 1953 Act was extensively revised by the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629. See 43 U.S.C. (Supp. II) 1331 *et seq.* The Amendments were designed to improve the management of the oil and gas resources of the OCS, and to that end provided for increased federal responsibilities and more specific mandates and guidelines for their implementation. A major focus of the Amendments was the requirement that the Secretary of the Interior develop a comprehensive leasing program by establishing a 5-year schedule of proposed lease sales, indicating the size, timing and location of OCS leasing activities. Before approving the leasing program, the Secretary of the Interior must submit it to specified federal and state

[6] This does not include the revenues from corporate income taxes or windfall profit taxes attributable to revenue from OCS leases.

officials and to Congress for comments. Once the program is approved, lease sales are held pursuant to it. Annual reports on the program must be submitted to Congress, along with any proposed amendments and extensions of the current program.

The 1978 Amendments also authorized the use of new bidding systems for the OCS lease sales. Section 205(a) of the 1978 Act, 43 U.S.C. (Supp. II) 1337(a)(1), amended Section 8(a)(1) of the 1953 Act to specify a variety of types of bidding systems. The amended Section 8(a) continues the 1953 Act's provision that the competitive bidding is to be "under regulations promulgated in advance." The Department of Energy Organization Act, 42 U.S.C. (Supp. II) 7152(b) and 7153, gives to the Secretary of Energy the authority to issue regulations implementing the OCS bidding systems, but requires that he consult with the Secretary of the Interior.

The specified types of systems include the traditional system—a cash bonus bid with a fixed royalty of not less than 12½% (Section 8(a)(1)(A)).[7] In addition, under the Act as amended, the Secretary may use other bidding systems with a cash bonus as the bid variable: the fixed component may be a share of net profits (Section 8(a)(1)(D)), or both a royalty and a net profit share (Section 8(a)(1)(F)), or a predetermined sliding scale royalty that varies depending on the amount or value produced (Section 8(a)(1)(C)). The amended Act also permits the use of bid variables other than a cash bonus: a royalty bid with (1) a fixed cash bonus, or (2) a

[7] The cash bonus bid-fixed royalty system identified in Section 8(a)(1)(A) is referred to in this brief as the traditional system. The other bidding systems identified in Section 8(a)(1)(B) through (H) are called the alternative systems.

fixed commitment to spend a specified dollar amount for exploration (a work commitment) or (3) both a cash bonus and a work commitment (Section 8(a)(1)(B)); a profit share bid with a fixed cash bonus (Section 8(a)(1)(E)); a work commitment bid with a fixed cash bonus and a fixed royalty (Section 8(a)(1)(G)); or a work commitment bid with a fixed cash bonus and a predetermined sliding scale royalty (Section 8(a)(1)(C)). Finally, the Secretary of Energy may develop any other bidding system, including a modification of the enumerated systems, so long as the new system has no more than one bid variable and is not disapproved by Congress (Section 8(a)(1)(H)).[8]

The amended Section 8(a)(1) provides, as did the 1953 Act, that the selection among the bidding systems is to be "at the discretion of the Secretary"; in the amended Act, Congress expressly defined the scope of that discretion by requiring that the Secretary of the Interior is to use systems other than the cash bonus bid-fixed royalty system identified in Section 8(a)(1)(A) in "not less than 20 per centum and not more than 60 per centum of the total area offered for leasing each year" under the five year plan. (Section 8(a)(5)(B)). The Secretary of the Interior need not, however, comply with this constraint on his discretion if he concludes that to do so is "inconsistent with the purposes and policies" of the Act—either because the traditional system should be used more or less frequently (*ibid.*). That conclu-

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[8] Under Section 8(a)(4)(A), 43 U.S.C. (Supp. II) 1337(a)(4)(A), the Secretary of Energy must submit any Section 8(a)(1)(H) system to the Congress; that system may then be used by the Secretary of the Interior unless either the House or the Senate has passed a resolution of disapproval within 30 days.

sion must be explained to Congress (Section 8(a)(9)(E)).

The Secretary of Energy is to consult with the Secretary of the Interior and submit an annual report to Congress, identifying the bidding systems that have not or will not be used, and explaining the reasons for the decision not to use them. Section 8(a)(9)(D), 43 U.S.C. (Supp. II) 1337(a)(9)(D). The Secretary of the Interior makes a similar report. 43 U.S.C. (Supp. II) 1343(2)(A).

2. As required by Section 18 of the amended Act, 43 U.S.C. (Supp. II) 1344, the Secretary of the Interior prepared and sent to Congress in April 1980 a five-year program for the period from June 1980 through May 1985.[9] The program provides for 36 sales; the first three were held in September, October and November of 1980, one was held in May 1981, and 6 more are scheduled for the balance of 1981. In each lease sale, a number of tracts are offered. The prospects for the discovery of substantial oil and gas resources, and the costs of the recovery of those resources, vary substantially from tract to tract.[10] For

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[9] The Secretary of the Interior has recently requested comments on a proposed revision of the leasing program, covering the period from January 1982 through December 1986. 46 Fed. Reg. 22468 (1981). The proposal contemplates area-wide lease offerings (7 planning areas off the contiguous 48 States and 15 off Alaska are identified), and an increase in the number of annual lease sales over the current plan. In seeking public comments on the appropriateness of various "streamlining proposals", the notice requests consideration of the question: "Which of the bidding systems authorized by the OCS Lands Act, as amended, would be most compatible with area-wide offerings?" (*id.* at 22473). The Secretary will consider comments received when he adopts a new five-year plan in June 1981 (*id.* at 22468).

[10] A recent study estimates that exploration and development costs on the OCS range from $98 million to $1.27 billion

that reason, the extent of bidder interest also varies widely from tract to tract.[11] In order to compare the results of the various systems, an effort is made to select comparable tracts for use of the alternative systems. The bidding systems other than the one identified in Section 8(a)(1)(A) have been used in 49% of the total area offered for leasing since September 1978.[12]

The Secretary of Energy has issued several bidding system regulations.[13] Final regulations for the cash bonus bid-fixed royalty bidding system described in Section 8(a)(1)(A) were promulgated on Feb. 5, 1980 (45 Fed. Reg. 9536). At the same time, the Secretary issued regulations for the royalty bid-fixed cash bonus bidding system described in Section 8(a)(1)(B) and a cash bonus bid-fixed sliding scale royalty bidding system, one of the alternatives de-

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per tract in 1979 dollars. (Cabot Consulting Group, *Competition on the Outer Continental Shelf and Its Implications for Competition in Downstream Markets*, DOE Contract No. DE-AC01-79RA35011, Table 3-1, at 23 (July 14, 1980)).

[11] This variation is reflected in the difference in the size of the bonus bids on the tracts in the FY 1979 lease sales, which ranged from $100 thousand to $153 million under one bidding system (cash bonus bid-fixed royalty) and from $81 thousand to $143 million under the other (cash bonus bid-sliding scale royalty). Summary of Recap of Bids for OCS Lease Sale 49, 58 & BF.

[12] The alternative bidding systems used were a cash bonus bid fixed profit share bidding system, and a cash bonus bid-fixed sliding scale royalty bidding system.

[13] While these regulations were being promulgated, the Secretary of the Interior continued to hold lease sales and issue leases under the system authorized in the original 1953 Act, as Congress intended. H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 138 (1977).

scribed in Section 8(a)(1)(C) (45 Fed. Reg. 9536 (1980)). A few months later, he promulgated final regulations for a cash bonus bid-fixed net profit share bidding system, as described in Section 8(a)(1)(D) (45 Fed. Reg. 36784 (1980)). On remand to the district court from the instant judgment, the parties stipulated to the entry of an order requiring the Department of Energy to issue final regulations for a net profit share bid-fixed cash bonus bidding system (as described in Section 8(a)(1)(E)) by May 25, 1981, and for a work commitment bid-fixed cash bonus and fixed royalty bidding system (as described in Section 8(a)(1)(G)) by June 30, 1981. The final net profit share bid regulation was accordingly issued on May 22, 1981 (46 Fed. Reg. 29680 (1981)), and the Secretary plans to issue the final work commitment bid regulation by June 30.[14] Regulations have not been proposed for the bidding systems authorized by Section 8(a)(1)(F)—cash bonus bid with a fixed royalty and a fixed net profit share—or for the additional systems authorized by Section 8(a)(1)(C) and (B)—the work commitment bid-fixed cash bonus and fixed sliding scale bidding system, and the royalty bid-fixed work commitment bidding system. No novel bidding systems of the kind authorized by Section 8(a)(1)(H) have been proposed.[15]

3. Respondents' complaint, filed June 22, 1979, alleged that the continued use of the Section 8(a)(1)

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[14] Proposed work commitment regulations were issued on March 30, 1981 (46 Fed. Reg. 20522 (1981)).

[15] A Notice of Inquiry published July 25, 1980 (45 Fed. Reg. 49586) requested comments on possible Section 8(a)(1)(H) bidding systems utilizing a work commitment component.

(A) cash bonus bid-fixed royalty bidding system did not promote adequate competition or obtain a fair return for the interests leased (App. 19, 39-44, 49-59).[16] Respondents charged that the continued use of this system by the Secretary of the Interior, and the fact that the Secretary of Energy had not promulgated regulations implementing alternative bidding systems, violated the OCS Lands Act, as amended (App. 19, 89-92). Claiming standing as consumers of oil and gas, as taxpayers, and as competing lessors of offshore oil and gas properties (App. 19-23, 86-88), respondents sought declaratory and injunctive relief prohibiting (1) further lease sales until alternative bidding system regulations were promulgated, and (2) further lease sales using "cash bonus, low-royalty bidding systems" (App. 20, 92, 96).[17]

On June 25, 1979, four days before the scheduled opening of bids at Lease Sale 48, respondents filed a motion for a preliminary injunction seeking to prevent further lease sales "in the absence of regulations establishing the full range of bid systems mandated by the Outer Continental Shelf Lands Act" (J.A. 129).[18] After a hearing, the district court de-

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[16] The complaint objected to the continued use of the "cash bonus, low-royalty system" (see, *e.g.*, App. 39 *et seq.*, 93 *et seq.*), which apparently meant only the cash bonus system using the 16 2/3% fixed royalty (see, *e.g.*, App. 50, 81, 96). The complaint identified as a desirable alternative the cash bonus bid-sliding scale royalty system (App. 54).

[17] Respondents also sought an order requiring defendants to review all past leases to determine whether their issuance and continuance was consistent with the OCS Lands Act, and, if not, to take corrective action (App. 100). They have abandoned this claim, and it was dismissed on May 7, 1981.

[18] In opposing the preliminary injunction, the government noted respondents' lack of standing (J.A. 174, 192-194).

nied that motion, ruling that respondents had not shown a likelihood of prevailing on the merits (App. 192-193), and that the pace at which defendants were issuing bidding system regulations was not arbitrary and capricious, "in light of the complexity and sensitivity involved in preparation of such reglations" (App. 193).

Respondents appealed to the United States Court of Appeals for the District of Columbia Circuit, which affirmed, noting that the 1978 Amendments continued to authorize the use of the cash bonus bid-fixed royalty bidding system, as well as others (Pet. App. 86a). Emphasizing that the selection of bidding systems for use in lease sales was to be at the discretion of the Secretary of the Interior, the court recognized that discretion was "limited in one crucial respect," by the requirement of Section 8(a)(5)(B) that the cash bonus bid-fixed royalty bidding system was to be used in at least 40%, but not more than 80%, of the lease offerings in the first five years (*id.* at 86a-87a). The challenged offerings "fall well within the [required] percentages," since 50% were offered under the cash bonus bid-fixed royalty bidding system and 50% under a cash bonus bid-fixed sliding scale royalty bidding system (Pet. App. 88a; see Section 8(a)(1)(C)). The court of appeals also agreed with the district court's conclusion that the rate at which the bidding system regulations were being promulgated was not unreasonable (Pet. App. 88a-92a).[19]

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[19] The court of appeals also rejected respondents' primary contention at that stage of the litigation, which focused on the clause in Section 8(a)(5)(B) permitting the Secretary of the Interior to avoid the percentage requirements if he determines that they are inconsistent with the Act's purposes and policies. Respondents argued that the cash bonus bid-fixed royalty bidding system was so disadvantageous to the

After affirming the denial of the preliminary injunction, the court of appeals remanded the case for further proceedings. Both parties thereupon moved for summary judgment,[20] and respondents again sought a preliminary injunction to prevent future lease sales until additional bidding system regulations had been issued. On September 17, 1980, the district court denied all motions (Pet. App. 60a-61a, 74a). Respondents appealed from the denial of their second motion for preliminary injunction, and after expedited consideration (see 43 U.S.C. (Supp. II) 1349(d)), the court of appeals on September 29, 1980, affirmed the district court's action to the extent that it permitted the lease sales scheduled for September, October and November 1980 (Pet. App. 2a-3a & n.5). Thereafter, and without briefing on the merits, the court entered the judgment that is the subject of our petition, and an opinion that not only explains the basis for the affirmance of the refusal to enjoin the pending 1980 sales (Pet. App. 47a-48a), but also rules on "the basic statutory issue dominating this protracted litigation" (Pet. App. 23a), concluding that the Secretary of the Interior is required to utilize at least some bidding systems in which the cash bonus is not the bidding variable,[21] and

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government that the Secretary's failure to determine that it should not be used at all was an abuse of discretion. The court of appeals disagreed (Pet. App. 92a-96a), and that contention is not urged here.

[20] The government's motion was based in part on respondents' lack of standing. Statement of Points And Authorities In Support of Defendant's Cross-Motion For Summary Judgment And In Opposition To Plaintiffs' Motion For Partial Summary Judgment, Or In The Alternative, For Preliminary Injunction, at 10-15 (filed June 23, 1980).

[21] The extent of the Secretary of the Interior's obligation under the court of appeals' opinion to experiment with the

that the Secretary of Energy must issue the appropriate bidding system regulations.[22] The opinion accordingly directs that the district court, on remand, "should insure that, to the maximum extent feasible, regulations for the two non-cash bonus variable bidding options set out in section 8(a)(1)(E) and (G) are promulgated before further lease sales take place in 1981" (Pet. App. 50a).

In a final footnote, the court of appeals found standing in the respondents as consumers and as competitors.[23] The court found that the California governmental respondents had alleged a "concrete and tangible" economic injury (Pet. App. 52a n.*)[24] and that the consumer respondents had alleged

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alternative systems is unclear. Compare Pet. App. 38a, 40a-41a, 49a (obligation to test all) with 29a, 31a, 38a, 48a n.96, 49a (semble) (obligation to test non-cash bonus alternatives) and 38a, 41a-46a, 74a (obligation to test variable net profit share). See also Pet. App. 47a n.95.

[22] Parts of the opinion also suggest that the Secretary of Energy has an obligation to promulgate regulations covering each of the bidding systems specified in B through G (Pet. App. 35a, 38a).

[23] Respondents also asserted standing as taxpayers and citizens, on the theory that the bidding injured them because the federal treasury did not receive enough money for the resources (App. 87-88).

[24] The California State Lands Commission and the City of Long Beach alleged that their ability to lease their undeveloped oil and gas lands was threatened by the federal leasing project's "generous" terms (App. 88). They also claimed, in a letter filed as an appendix to their complaint (App. 122), that they were harmed in "drainage" situations: where a pool of oil or gas crosses the line separating state ownership from federal ownership. In such a situation, they claimed that they would receive insufficient payment for their

sufficient economic harm to have standing on that basis (*id.* at 52a-53a n*).[25]

SUMMARY OF ARGUMENT

I

Respondents lack standing to sue, because there is an insufficient relationship between the federal actions they challenge and their interests, either as consumers of oil and gas or as competitors in leasing oil and gas rights in submerged lands. Their assertions—that the failure to promulgate bidding system regulations and to use those systems in actual lease sales cause private companies to act in ways that raise the price of oil and gas and render it impossible for the states to obtain adequate revenues for their submerged land offerings—are the sort of tenuous and speculative claims of injury that this Court has repeatedly held to be insufficient to meet the "case or controversy" requirement of Article III of the Constitution. Even if the constitutional requirement is met, the usual prudential limitations on standing apply with particular force in the context of this Act, which was amended in 1978 to permit the expeditious development of the OCS. Nothing in the "citizen suit" provision (43 U.S.C. (Supp. II) 1349

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share of pooled resources because of the low payments received by the federal government under its leases. No specific drainage situation, however, was identified.

[25] As consumers, respondents claimed that they were harmed because only large businesses could afford bidding systems using large cash bonuses and as a result there was less competition under those systems; the decreased competition, they reasoned, caused them to pay more for gas and oil they consumed than they would otherwise have to pay (App. 86-87).

(a)(1)) suggests that Congress intended to authorize the serious impediment to orderly lease sales that would result from permitting suits by persons with only the attenuated interests of these respondents.

II

In any event, neither the language of the OCS Lands Act nor its legislative history show an intent by Congress to require experimentation with any specific one of the alternative systems set out in Section 8(a)(1)(B) through (H) of that Act. The wording of the Act is clear: it requires the use of the traditional cash bonus bid-fixed royalty share bidding system in 40 to 80% of lease sales, but leaves the choice of which alternative systems to utilize in the remaining sales to the discretion of the Secretary of the Interior. Nor does the statutory language, in terms or by implication, require the Secretary of Energy to promulgate regulations for any bidding systems that would not further the purposes of the Act. Absent exceptional circumstances, not present here, there is no reason to look beyond the unambiguous language of the statute to the legislative history. If the legislative history is examined, however, it shows that Congress distinguished only between the traditional cash bonus bid-fixed royalty system identified in Section 8(a)(1)(A) and the various alternatives to that system, several of which also include a cash bonus bid as the bid variable. The question whether the Secretary of the Interior should be precluded from relying entirely on the traditional bidding system was extensively debated; the Act reflects the resolution of that debate in the 40 to 80% requirement. There was, however, no intent to prescribe the details of the experimentation required, or to impose an inflexible requirement that

each system, or any particular type of system, be tested in actual lease sales, even if the Secretary had concluded that it would disserve the statutory purposes to do so. Instead, the legislative history reflects the expectation that the Secretary of the Interior would use his discretion in determining when and where to make use of alternative systems, and provides criteria to guide the exercise of that discretion.

ARGUMENT

I. THE RESPONDENTS LACK STANDING TO SUE

a. This Court has held that in order to have standing to sue, plaintiffs must allege a "distinct and palpable injury." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). They must also show that there is a "fairly traceable" causal connection between the claimed injury and the challenged conduct, *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977), so that if the relief sought is granted, the injury will be redressed. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-45 (1976). Moreover, while a person indirectly injured by governmental activity that directly affects only a third party may have standing to challenge that activity, the indirectness of the injury "may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Warth* v. *Seldin*, *supra*, 422 U.S. at 505.

Respondents here have not met those requirements. The complaint alleges three bases for standing: as consumers of oil and gas, as federal taxpayers, and as owners of off-shore property that could be leased in competition with the OCS. As consumers, respond-

ents contend that experimentation with non-cash bonus bidding systems is likely to demonstrate that those systems increase competition, attracting firms that are more likely to explore and produce petroleum more cheaply than the firms that obtain the leases under the cash bonus bid systems.[26] As competitors, they assert that the cash bonus bid systems are so favorable to bidders that they are not interested in bidding on respondents' properties under systems that assure a higher return to respondents, and that respondents cannot receive a fair return in "drainage" situations where the pool underlies both federal and state lands.[27]

These assertions are typical of the highly speculative claims that this Court has consistently rejected as bases for standing, demanding "something more than an ingenious academic exercise in the conceivable." *United States* v. *SCRAP*, 412 U.S. 669, 688 (1973).

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[26] Respondents' claim of standing as taxpayers was not pressed in the district court nor passed on by the court of appeals (see Pet. App. 53 n.*). The claim rests on the assertion that use of the alternative systems will result in greater returns to the Treasury than the systems now utilized. It is thus subject to speculative uncertainties similar to those discussed *infra* in regard to consumer claims. There is an insufficient logical nexus between respondents' status as taxpayers and the challenge to the bidding systems used in OCS leases. Cf. *Flast* v. *Cohen*, 392 U.S. 83, 101-102 (1968). See also App., *infra*, 1a-5a.

[27] Respondents' claims as consumers and as competitors are significantly inconsistent: As competitors, state respondents contend they would benefit because under the alternative bidding systems, fewer bidders would be interested in federal leases and more in any leases they might choose to offer. But the consumer respondents argue that the use of those same alternative systems will *increase* the number of bidders interested in federal leases.

Thus, respondents' claim that alternative systems are likely to attract more efficient producers, ultimately resulting in lower consumer prices, is at least as speculative as the assertion in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), that the alteration in an IRS ruling would encourage hospitals to offer services to indigents; or the claim in *Warth* v. *Seldin*, 422 U.S. 490 (1975), that an alteration in zoning regulations would enable the petitioners to construct and occupy moderately priced housing; or the assertion in *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973), that application of criminal sanctions against non-support to fathers of illegitimate children would result in payments by the father of petitioner's child. Here, as in those cases, the alleged injury results from the independent actions of third parties not before the court, not from the actions of defendants, and the claim that the judicial relief sought will redress the claimed injury is simply too speculative to confer standing. Cf. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra*, 426 U.S. at 41-42.

Indeed, the assertion that increased participation in bidding will result in more efficient exploration and production, and ultimately in lower consumer prices, overlooks the realities of the leasing process, this country's dependence on foreign oil, and the structure of the world oil market. First, the extent of competition for a particular lease depends far more on the estimates of the resources and the costs of development of the tract covered by the lease than on the bidding system involved.[28] Second, the

[28] Competition is primarily limited by the intractable economics of the endeavor. Because development costs for a single tract may exceed $1 billion, OCS leases are of interest only to firms, or combinations of firms, that can finance large capital projects. In reaction to this problem, small companies

effects of exploration and production efficiencies on the OCS on the ultimate cost of oil and gas to consumers is negligible. Consumer prices are the result of many factors in addition to the price of crude oil including the costs of refining, transportation and marketing. And, even assuming that increased competition for OCS oil and gas leases might result in exploration and production efficiencies that would, in a free market, cause perceptible crude oil price reductions, oil and gas prices are not freely determined in a competitive market, but reflect the dominance of a world-wide cartel. So long as that cartel continues to dominate the world oil market and the United States continues to import substantial portions of its oil supply, domestic oil prices will be unaffected by any increased efficiency in OCS operations—or by any other effect of the hoped for increased competition for OCS leases. Indeed, respondents have not spelled out in any detail the relation between their interests as consumers and an increase in competition for OCS leases.[29]

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may join others in bidding combines, taking partial interests in a number of tracts. *Outer Continental Shelf Lands Act Amendments of 1977: Hearings on H.R. 1614 Before the House Ad Hoc Select Comm. on OCS*, 95th Cong., 1st Sess., Pt. 2, 1526 (1977) (hereinafter cited as "*House Hearings*").

[29] Respondents' suggestion that reliance on the traditional Section 8(a)(1)(A) system decreases the amount of oil and gas available by encouraging the large oil companies to "stockpile" rather than develop their leases, is also speculative. In any event, high cash bonus bids have precisely the opposite tendency. High lease acquisition costs encourage prompt exploration and development in order either to recoup the bonus through production revenue or to maximize the benefit of the tax write off of the bonus if no resources are discovered. The lower acquisition costs and higher contingency costs of the alternative systems offer greater incentives to "stockpiling". See App., *infra*, 1a-5a.

In sum, the relation between the bidding systems utilized in OCS leasing and the ultimate prices paid by consumers is far less direct than the consumer standing recognized in *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 335 (1979), where it was alleged by a hearing-aid purchaser that a variety of antitrust violations, including vertical and horizontal price fixing, by the manufacturers of hearing aids had led to inflated consumer prices.[30]

The bare allegation of the two California governmental entities that they would obtain better returns on their offshore oil and gas properties if the federal government altered its OCS leasing policies is similarly speculative. The state has announced no plans to issue oil and gas leases for its offshore properties, let alone made any showing that if it did so, the OCS lease terms would be reasonably likely to affect industry interest in leasing state properties.[31]

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[30] The other cases on which the court below relied in finding consumer standing are even less relevant, since they involve challenges by consumer groups to regulatory agency actions permitting price increases to oil and gas producers. *Consumers Union of United States, Inc.* v. *Sawhill*, 525 F.2d 1068 (Temp. Emer. Ct. App. 1975); *Consumer Federation of America* v. *FPC*, 515 F.2d 347 (D.C. Cir. 1975); *Consumers Union of United States, Inc.* v. *FPC*, 510 F.2d 656 (D.C. Cir. 1974). Plaintiffs' standing was apparently not challenged in those cases, and, in any event, the relation of the producers' price increases to the consumers' costs was clear and direct.

[31] In order to make such a showing, it would have to appear that state and federal lease sales would be in competition with each other—that there is a fixed demand for leases that is nearly satisfied by the federal offerings, so that more bidding on federal leases would result in less bidding on state ones. It would also have to be shown that the properties offered under the two systems would be similar enough (in terms of their potential for containing recoverable quantities of oil

Respondents' situation here is thus not like that of the petitioner granted standing as a competitor in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152 (1970), who could point to specific customers lost as a direct result of the agency action there challenged. Instead, this case resembles *American Society of Travel Agents, Inc.* v. *Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978), in which allegations of general competitive disadvantage were insufficient to show standing to challenge a tax preference given to a competitor.

Nor does the possibility that the governmental respondents might be affected by a "drainage" situation suffice as a basis for standing. Nothing in the record suggests that, if the relief respondents seek were granted, the Secretary of the Interior would be required to use a non-cash bonus bid bidding system for any tract over a pool that also lies under state property. Respondents have accordingly not shown that the relief requested would redress any injury they might suffer in a drainage situation. Indeed, the statute suggests that respondents' claims of the potential for injury in the drainage situation may be overstated. Section 8(g)(2) of the Act, as amended, 43 U.S.C. (Supp. II) 1337(g)(2), provides for agreements between the state and federal governments for the "fair and equitable" division of the proceeds when the federal government leases tracts overlying a common pool. Such an agreement is specifically designed to insulate a state from any possible harm due to the government leasing.

Respondents' bare allegations of injury are also in sharp contrast to the factual findings, based on four

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and gas and the costs of that recovery) so that differences in the leasing systems would make a significant difference in the attractiveness of the leases offered under the two systems.

days of testimony, on which this Court relied in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978). Those factual findings—that appellees would be exposed to immediate adverse effects from the construction of the proposed nuclear plant, and that in the absence of the challenged statute, the plant would not be constructed—were not clearly erroneous, and satisfied the requirement of a "fairly traceable" causal connection between the claimed injury and the remedy sought. There are no similar findings here.[32]

b. This Court recognized in *Warth* v. *Seldin*, *supra*, 422 U.S. at 514, that, if the minimal constitutional "case-or-controversy" requirements of Article III are met, Congress can create a statutory right to sue in persons who, without the statute, would have had no standing. See also *Sierra Club* v. *Morton*, 405 U.S. 727, 732 n.3 (1972). In light of the precedent discussed above, we contend that the re-

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[32] The Court in *United States* v. *SCRAP*, *supra*, 412 U.S. at 686-690, found standing based on an allegation that a general freight rate increase would discourage the use of recyclable goods, thus requiring the use of more natural resources and adversely affecting the environment in which plaintiffs lived. Although the Court characterized this line of causation as "attenuated" (*id.* at 688), it is substantially more direct than the chain of causation relied on by respondents here. Moreover, the issue in SCRAP was simply whether the complainants' allegations of standing were sufficient to withstand a motion to dismiss. As the Court noted in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra*, 426 U.S. at 45 n.25, and as the SCRAP Court itself emphasized (412 U.S. at 689-690), those claims might not have survived a motion to dismiss supported by affidavits challenging the accuracy of the allegations. There was such a motion here, and the Heintz affidavits contain the necessary showing of the inaccuracy of the respondents' allegations concerning the performance of the bidding systems in question (App. 174, 266).

spondents have not satisfied the Article III standing requirements. If this Court should disagree, it would then be appropriate to consider whether respondents have a statutory right to sue by virtue of 43 U.S.C. (Supp. II) 1349(a)(1), the "citizen suit" provision of the 1978 Amendments. That Section provides in relevant part that "any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States." Because the statute permits suit only by those having "a valid legal interest," it does not help respondents.[33] The legislative history of the section confirms that it was not designed to expand the standing of those alleging attenuated economic interests. H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 161 (1977), emphasizes that the interest asserted "must be discernible and ascertainable." The purpose was simply to assure standing to those with a "definable aesthetic or environmental interest," as well as those with the traditional economic interest.[34] As we have shown, respondents have no

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[33] The typical citizen suit provision in resource protection statutes contains no such limitation. See, *e.g.*, 16 U.S.C. 1540(g) (Endangered Species Act of 1973); 42 U.S.C. 1857h-2 (Clean Air Act); 33 U.S.C. 1415(g) (Ocean Dumping Act).

[34] The reports of the Oversight Committee on which the court below relied confirm this reading. H.R. Rep. No. 95-1835, 95th Cong., 2d Sess. 22 (1979), explained the new provision as providing for "expedited judicial review"; it did not suggest any expansion in the standing accorded to those with economic interests. Similarly, H.R. Rep. No. 96-1214, 96th Cong., 2d Sess. 18-19 (1980), explains that the section is designed to "promote unitary court actions," and strongly suggests that any expansion in the scope of standing was limited to assuring that those who have definable aesthetic or environmental interests at stake are given equal status with those asserting traditional economic interests.

discernible or ascertainable economic interest in the bidding systems utilized in OCS leasing, nor do they allege any aesthetic or environmental interests that may be affected by the Secretaries' actions. They accordingly have no standing based on 43 U.S.C. (Supp. II) 1349(a)(1).

The usual prudential limitations on standing apply with particular force in the context of the OCS leasing program established by the 1978 Amendments. As more fully explained in the amicus brief of *Atlantic Richfield Co.*, a major purpose of those Amendments was to eliminate delays in the leasing of OCS mineral rights; the conclusion that respondents have standing as consumers is inconsistent with that purpose. If status as a consumer of oil and gas products is sufficient to show standing in this case, virtually any citizen who disagrees with any aspect of federal leasing policies will have standing to challenge them in court, thus greatly increasing the potential for delays in implementing the program, in direct opposition to the congressional purpose. Cf. *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 220 (1974); *Western Mining Council* v. *Watt*, 643 F.2d 618, 623-624 (9th Cir. 1981).

This is not a situation in which the denial of standing to these respondents will insulate the Secretaries' activities from judicial review entirely. If, as respondents claim, the bidding policies place an improper burden on the ability of smaller firms to compete for OCS leases, those firms would clearly have standing to challenge those policies. They have neither joined in respondents' suit nor raised similar challenges themselves. In fact, respondents' enthusiasm for the non-cash bonus bidding systems is apparently not shared by those firms. At the hearings on the Amendments to the OCS Lands Act, a representative of the Domestic Petroleum Council, an

association of 21 medium to small independent oil companies, testified that the cash bonus bid-fixed royalty bidding system did not inhibit competition by those firms, and that they were "more than content with" that system. *House Hearings* 1492, 1525-1526; *Outer Continental Shelf Lands Act Amendments of 1977: Hearings on S. 9 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 276, 290-291 (1977). See also 46 Fed. Reg. 29682 (1981).

II. THERE IS NO OBLIGATION UNDER THE ACT TO PROMULGATE REGULATIONS FOR, OR TO EXPERIMENT WITH, ANY PARTICULAR ALTERNATIVE BIDDING SYSTEM

A. The Statutory Language is Unambiguous

The OCS Lands Act, as amended, contains an unusually precise specification of the obligation to experiment with bidding systems other than the one defined in Section 8(a)(1)(A). Neither the court below nor the opposition to the petition for certiorari has suggested any way in which that clear statutory language can be reconciled with the conclusion of the court below that the Secretary of Energy must promulgate regulations for, and the Secretary of the Interior must utilize, bidding systems even if they determine that their utilization will not be consistent with the purposes of the Act.[35] Although we do not

[35] In their opposition, respondents urge that the bidding systems they prefer are more likely to achieve the statutory purposes than the ones utilized to date (Br. in Opp. 23-25). It is beyond dispute, however, that the determination of which bidding systems are most likely to serve the various statutory policies is precisely the kind of complex technical question that must be left to expert administrative determination under the Act. Neither the respondents nor the courts have any statutory authority to substitute their judgment about such matters for that of the administrative agencies. See,

believe that the legislative history upon which the court below and respondents rely supports their interpretation of it, our principal reliance is on the plain language of the statute. This case presents no "'rare and exceptional circumstances'" justifying further inquiry, because here, as in *Rubin* v. *United States*, No. 79-1013 (Jan. 21, 1981), slip op. 6 (collecting cases), the unambiguous statutory language is entirely consistent with the history and purposes of the Act, as well as with customary legislative practices in providing for management of the federal domain.[36]

Section 8(a)(1) of the Act (43 U.S.C. (Supp. II) 1337(a)(1)) authorizes the Secretary of the Interior, to use his discretion in selecting the bidding systems for use in lease sales. That Section provides that "[t]he bidding shall be at the discretion of the Secretary, on the basis of [the specified systems]." That discretion is not unlimited. The precise extent of the statutory mandate to use the various bidding systems is spelled out in Section 8(a)(5)(B): Alternatives to the system specified in Subsection 8(a)(1)(A)—the cash bonus bid-fixed royalty bidding system—must be used in not less than 20% and not more than 60% of each year's lease sales for five years from the enactment of the 1978 Amendments, unless the Secretary determines that those percentage requirements

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e.g., *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-525 (1978).

[36] In the absence of specific statutory limitations on the Secretary of the Interior's authority (as, for example, in the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, and the Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*), he retains broad discretion in administering the public lands. *See, e.g., Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 336 (1963); *United States* v. *Wilbur*, 283 U.S. 414, 419 (1931).

are inconsistent with the purposes and policies of the Act. There is simply no room in this precisely defined legislative mandate for any implication that the Secretary must utilize any specific system other than that identified in Section 8(a)(1)(A). In light of the "escape hatch" provision (see H.R. Rep. No. 95-590, *supra*, at 139), permitting the Secretary of the Interior to alter the established percentage requirements if he determines that they are inconsistent with the statutory purposes, it is particularly inappropriate to read into the Act a rigid requirement for experimentation with a particular system if the Secretary of the Interior has determined, after consultation with the Secretary of Energy, that use of the system will disserve the statutory purposes.

If the language of Section 8(a)(5)(B) left any room for doubt about the Secretary of the Interior's discretion to select only those alternative systems that he concludes are likely to further the statutory purposes, that doubt is dispelled by the reporting requirements of the Act, which recognize the possibility that some of the specified bidding systems will not be used, and require the Secretaries to report the reasons for that non-use to the Congress (43 U.S.C. (Supp. II) 1337(a)(9) and 1343(2)(A)).

The statute thus identifies a variety of bidding systems, directs the Secretary of the Interior to use the one defined in Section 8(a)(1)(A), and to select from among the alternative systems for leasing between 20% and 60% of OCS lands in the first five years of the Act unless he determines that the statutory purposes would not be served by such experimentation; it also requires reports on the reasons any system has not been selected. This statutory scheme implements the congressional desire for experimentation with alternative systems, but avoids tying the Secretary's hands with rigid requirements that can

only hinder the effort to develop the best possible bidding systems.[37]

Although the Secretary of Energy's responsibilities for promulgating regulations for the use of the alternative systems are not spelled out in similar statutory detail, there is not the slightest indication that he must promulgate regulations in the absence of any likelihood that they will be used.[38]

Under the 1953 OCS Lands Act, the Secretary of the Interior was responsible for issuing the bidding system regulations, as well as using them (43 U.S.C. 1334(a)(1), 1337(a)). The Department of Energy Organization Act transferred the responsibility for the promulgation of the OCS bidding system regulations to the Secretary of Energy (42 U.S.C. (Supp. II) 7152(b)). The 1978 Amendments to the OCS

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[37] The congressional interest in assuring the Secretary's flexibility to determine the bidding systems with which he will experiment, while maintaining close congressional scrutiny of the exercise of that flexibility, is further demonstrated by the reporting requirements and Section 8(a)(1)(H). After identifying a variety of types of bidding systems in Section 8(a)(1)(A)-(G), Congress included a catch-all provision, permitting the administrative development of still further variations of the identified systems—or the development of entirely novel systems—so long as the new systems were submitted to Congress.

[38] Neither the court below nor respondents allege that such an independent duty exists. Instead, they base their argument that the Secretary of Energy must issue regulations on the asserted obligation of the Secretary of the Interior to use them. It is, nevertheless, conceivable that the Secretary of Energy could be required to promulgate regulations which would be available to the Secretary of the Interior if he should then decide to use the alternative system described. The discussion above shows that this conceivable statutory scheme was not the one selected by Congress.

Lands Act confirmed the transfer (43 U.S.C. (Supp. II) 1331(b)), and required close cooperation between the two Departments in developing the regulations (42 U.S.C. (Supp. II) 7153(b)). If the responsibility for development and use of the regulations had remained with the Secretary of the Interior, it could scarcely be argued that he was required to develop regulations he did not intend to use. There is nothing in the separation of the responsibilities that suggests Congress intended, purely by implication, to impose such a requirement. Indeed, the cooperation requirement strongly suggests otherwise—instead of the Secretary of Energy working independently to present a full array of regulations to the Secretary of the Interior for his selection of those he preferred to utilize, the two were to cooperate from the beginning to assure that the eventual product was consistent with the purposes of the statute.[39] By requiring cooperation, Congress avoided the wasteful expenditure of administrative resources that would be involved in the promulgation of a full array of regulations before the Secretary of the Interior made his selections.

In the OCS Lands Act, when Congress intended to require the promulgation of regulations, plans, or procedures, it did so specifically. (See, *e.g.*, 43 U.S.C. (Supp. II) 1334(a), 1344(a)-(f), 1337(a)(6) and (9), 1343). In that context, the bare requirement that lease sales be conducted "under regulations promulgated in advance" (43 U.S.C. (Supp. II) 1337

[39] The closeness of the intended working relationship between the two agencies is also evidenced by the requirement that the Secretary of the Interior obtain the Secretary of Energy's approval for proposed lease terms and conditions (42 U.S.C. (Supp. II) 7153(c)(1)).

(a)(1)) cannot reasonably be read as sufficient to impose on the Secretary of Energy the obligation to promulgate an entire range of bidding system regulations.[40]

It is equally clear that Congress did not, in the 1978 Amendments, require the Secretary of the Interior to experiment either with non-cash bonus bidding systems, as the court below appeared to believe[41] or with a variable net profit share bidding system, as respondents argue (Br. in Opp. 23-25). Nothing in the statute limits the Secretary's discretion in selecting among the alternatives to the cash bonus bid-fixed royalty bidding system described in Section 8(a)(1)(A). Instead, three of the specifically described alternatives employ the cash bonus as the bid variable (Subsections (C), (D), and (F)), and nothing in Subsection (H) precludes the use of a cash bonus bid variable in a novel system or a variation on the

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[40] A requirement that regulations must be developed for all the specified systems is also inconsistent with the way in which the alternatives are identified in the statute—they are specified as examples of generic types of systems, rather than as definitive descriptions, leaving to the Secretary of Energy only the responsibility for filling in the details by regulation. For example, the Secretary could scarcely issue regulations that implement all the various alternatives possible under Subsection (C) or (G). And, of course, the final catch-all provision, Subsection (H), permitting the development of an unlimited number of novel systems or variations on the previous alternatives, is flatly inconsistent with any *requirement* that it be implemented by regulation. That inconsistency strongly suggests there is no such requirement for the parallel provisions of Section 8(a)(1).

[41] As we pointed out *supra*, note 21, it is difficult to determine precisely what the court below read the statute to require.

described alternatives. Moreover, in describing the limitations on the Secretary of the Interior's discretion in Section 8(a)(5)(B), Congress did not single out the non-cash bonus bid systems, either singly or as a group, as necessary subjects of experimentation. Congress evidently did not intend to channel the Secretary's discretion in choosing among the alternatives, or to draw any contrast between cash bonus bid systems and those using other bidding variables.[42] The only contrast was between the cash bonus bid-fixed royalty bidding system and all the others.[43]

B. The Legislative History Confirms the Clear Meaning of the Statutory Language

Respondents and the court below misconstrue the legislative history. They focus on separate but related themes that recur throughout the legislative histroy of the 1978 Amendments: dissatisfaction with "bonus bidding" or the "cash bonus system," particularly because of the requirement of large front end payments that was seen as inhibiting competition for leases, and a determination to require experimentation with alternative bidding systems. But a careful reading of the legislative history discloses

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[42] The fact that Congress did not draw any sharp distinction between bidding systems using a cash bonus bid and those using other bidding variables is demonstrated by the inclusion in Subsection (C), describing sliding scale royalty bidding systems, of both cash bonus bid and work commitment bid variations.

[43] Reading the statute to require the utilization of *all* the alternative systems would be subject to the same objections as requiring promulgation of regulations for all the alternatives. See, *supra*, note 40.

that general references to "bonus bidding" and the "cash bonus system" are used as shortened descriptions of the Section 8(a)(1)(A) cash bonus-fixed royalty system that had been used in almost all lease sales when the Amendments were being considered. It was that system, particularly when the fixed royalty was 16⅔%, that resulted in high front end payments, and it was alternatives to that system that were to be tested.[44]

Two statements from the legislative history relied on by the court of appeals (Pet. App. 31a, 29a) suffice to demonstrate the point.[45] In paraphrasing the requirements of Section 8(a)(5)(B), the Conference Report, H.R. Conf. Rep. No. 95-1474, 95th Cong., 2d Sess. 92 (1978), states:

> Bidding systems other than bonus bidding, including royalty, net profit, work commitment, and nonenumerated systems, are to be utilized in at least 20 percent and not more than 60 percent of the tracts offered for leasing in *all* OCS areas during each of the next 5 years. [Emphasis in original.]

Unless the reference to "bonus bidding" refers only to the traditional system described in Section 8(a)(1)(A), the summary is simply wrong: as explained above, Section 8(a)(5)(B) requires the use

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[44] The Report of the 1980 Oversight Hearings confirms this interpretation, recognizing that "alternative bidding systems such as the sliding scale royalty system have * * * met the OCSLAA requirement for the use of alternative bidding systems." H.R. Rep. No. 96-1214, 96th Cong., 2d Sess. 49 (1980). The sliding scale royalty system utilizes a bonus bid.

[45] Other examples may be found in H.R. Conf. Rep. No. 95-1474, *supra*, at 90, and in H.R. Rep. No. 95-590, *supra*, at 47, 54, 135, 140 n.50, 210.

of alternatives to the system specified in Section 8(a)(1)(A), but three of the enumerated alternative systems also involve bonus bidding, albeit with different forms of contingency payments. Similarly, the statement in the House Committee Report (H.R. Rep. No. 95-590, *supra*, at 139) that "[i]t was the intention of the committee that there be a clear mandate given to the Secretary to require him to use bidding systems other than the cash bonus bid" follows a discussion of the testimony concerning the traditional cash bonus bidding system, and the resolution of the disagreements over its desirability in the provision of the alternative systems. In context, it is clear that the reference to "the cash bonus bid" is to the system described in Section 8(a)(1)(A) only.[46]

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[46] The full quotation is as follows (H.R. Rep. No. 95-590, *supra*, at 138-139):

Mandated use of new bidding systems

Under existing law the Secretary is permitted to offer oil and gas leases on the basis of either (1) a cash bonus bid with a royalty fixed at no less than 12½ percent of the gross revenue from the lease, or (2) on the basis of a royalty rate bid with a fixed cash bonus. Since the OCS Lands Act was approved in 1953, virtually all OCS leases have been offered for cash bonus bids with a royalty rate fixed at 16 2/3 [percent] of the gross value of production.

The Department of the Interior held a small scale test of royalty bidding in September 1974.

Witnesses before the committee indicated that the high front-end bonus bids may have created a barrier to the entry of small and medium-sized oil firms as well as other potential exploiters, to the OCS activity, and that these types of bids do not, after the completion of exploitation of a lease area, provide a fair return to the Government.

Others, including representatives from some of the larger oil companies, indicated their satisfaction with the present front-end bonus system in that it provides

Dissatisfaction with large front end payments was a substantial basis for requiring experimentation with

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for rapid exploration and recovery of resources and has worked so as to provide maximum revenue with no risk to Government, and with ample opportunity for all to participate.

As indicated earlier, the 1977 amendments authorizes new bidding options. The basic thrust of all these new options is to reduce the reliance on large front-end cash bonuses as the means of obtaining a fair price for the public's property. The committee wants to authorize lease allocation systems that would encourage the widest possible participation in competitive lease sales consistent with receipt by the public of fair market value for its resources. The committee believes that arrangements can be effective in shifting new Government revenue away from initial bonuses and into deferred payments made out of a leaseholder's profits based on actual production of oil or gas.

In order to assure that these new bidding alternatives are used, the 1977 amendments limit the Secretary's authority to use the cash bonus—fixed royalty system, which has been the historical method of OCS bidding. The Secretary would have to use one of the new bidding systems in at least 50 percent of the total area offered for lease each year during the next 5 years, in frontier areas. However, if during the first year after enactment, the Secretary finds that compliance with this limitation would unduly delay OCS development, he may exceed the limit after reporting to Congress his findings and reasons. After the first year, the Secretary can only exceed the limitation if he demonstrates to Congress, in a report with specific findings and detailed reasons, that using new systems in 50 percent of the lease area offered would unduly delay efficient development, result in less than a fair return to the Federal Government, or result in a reduction of competition. Congress would have thirty (30) days to review the report and could dis-

alternatives to the traditional cash bonus bid-fixed royalty system. As the Reports explain, "[t]he basic thrust of all these new options is to reduce the reliance on large front-end cash bonuses" (S. Rep. No. 95-284, 95th Cong., 1st Sess. 73 (1977); H.R. Rep. No. 95-590, *supra*, at 139). That reduction is achieved by increasing the payments to be made during the life of the lease, on the theory that the more a bidder expects to pay during the life of the lease the less he will be willing to pay "up front." For instance, in the cash bonus bid-fixed net profit share bidding system, increasing the size of the net profit share demanded can be expected to reduce the size of the cash bonus bid. The relationship remains true regardless of what the bid variable is. Other things being equal, the size of the front end payments varies inversely with the size of the payments over the life of the contract. Thus, a reduction in the size of the front end cash bonuses does not require experimentation with non-cash bonus systems. It requires only an increase in the size of the down stream payments.[47]

The legislative history indisputably demonstrates that Congress intended to require experimentation with new bidding systems. There was substantial

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approve and thereby, nullify the request to exceed the limitation by a resolution of either House.

It was the intention of the committee that there be a clear mandate given to the Secretary to require him to use bidding systems other than the cash bonus bid. However, it did provide the two limited "escape hatches" in recognition that there could be administrative problems involved in implementing new concepts and procedures.

[47] Attempts have been made in recent lease sales to reduce the size of the front end bids by setting the fixed profit share at 45% and 50%, by increasing the amount of the sliding scale royalty, and even by setting the fixed royalty under the traditional system at 33 1/3% rather than at 16 2/3%.

disagreement about that requirement, which was resolved by the enactment of Section 8(a)(5)(B). We have found nothing in the legislative history of this requirement that suggests any intent to limit the Secretary's discretion to select among the available new bidding systems, or to require him to experiment with any particular system. Instead, the issue under consideration was the extent to which the Secretary of the Interior would be permitted to continue using the traditional cash bonus bid-fixed royalty system.

The bill, as reported by the Senate Committee on Energy and Natural Resources, would have required that the traditional system be used in no more than "66⅔ per centum of the total area offered for lease each year" during the following five years. See § 205(a)(6) of the Senate bill, as set out in S. Rep. No. 95-284, 95th Cong., 1st Sess. 10 (1977). During the debate on that bill, the Senate considered a proposed amendment which would have changed the 66⅔% limit to 50%. See 123 Cong. Rec. 23232-23245 (1977). No one suggested a requirement that any specific alternative, or any specific type of alternative, should be mandated.

Similarly, the bill reported by the House Ad Hoc Committee on the OCS would have required that the traditional cash bonus bid-fixed royalty system be used in no more than 50% of the total area offered for lease each year over the following five years. See § 205(a)(5)(C) of the House bill, set out in H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 11 (1977). In the debate on that bill, the House considered a variety of amendments that would have changed that percentage. See, *e.g.*, the Treen amendment, which would have abolished any restrictions on the discretion of the Secretary of the Interior, 124

Cong. Rec. H420-H424, H429-H430 (daily ed. Jan. 31, 1978),[48] the Brown amendment to the Treen amendment, which would have required alternative systems to be used in not less than 10% nor more than 30% of the area offered for leasing over the next five years (*id.* at H424-H428), and the Emery amendment, which required alternative systems to be used in not less than 20 and not more than 50% of the area leased for sale for the next five years (*id.* at H430-H431). This last amendment, which was adopted by the House (and resembles the Act as passed), reflects a compromise between the two sides. In the House, as in the Senate, the concern was with defining the percentage of tracts to be leased under the traditional system, so that the balance would be leased under experimental systems.

In light of this focus on limiting the Secretary's discretion to use the traditional cash bonus-fixed royalty system, it is not surprising that there is little discussion of how the tests were to be conducted. The aim was to require experimentation, not to prescribe its details.

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[48] The court below found the rejection of the Treen amendment inconsistent with the claim that the Act permits "the Secretary 'complete flexibility' to decide whether or not to issue regulations or utilize any specific alternative bidding systems" (Pet. App. 32a). But all that rejection shows is that Congress refused to permit the Secretary to conclude that only the traditional cash bonus bid-fixed royalty bidding system would be used. The rejection of the Treen amendment does no more than foreshadow the enactment of the limitation on the Secretary's discretion enacted in Section 8(a)(5)(B).

It is nevertheless clear that Congress did not contemplate that each specified system, or any particular novel system, would be tested. Instead, it left the selection of the appropriate systems for testing to expert administrative judgment, under general criteria that it prescribed. In the House bill (reprinted in H.R. Rep. No. 95-590, *supra*, at 11), the criteria for use in selecting "the bidding alternatives from among those authorized by this subsection" are specified in the text of the proposed Act itself. At conference, it was agreed that the criteria should be placed in the conference report, rather than the proposed Act, but the conferees emphasized their agreement with the substance of the criteria—and thus necessarily with the assumption that the Secretary of the Interior would use his judgment in selecting among the alternatives offered in the statute (H.R. Conf. Rep. No. 95-1474, *supra*, at 91-92. See also H.R. Rep. No. 95-590, *supra*, at 140 n.50; 124 Cong. Rec. H599 (daily ed. Feb. 2, 1978) (remarks of Rep. Leggett); 123 Cong. Rec. 23242 (1977) (remarks of Sen. Metzenbaum); 124 Cong. Rec. H190 (daily ed. Jan. 25, 1978) (remarks of Rep. Fish); *id.* at H197 (remarks of Rep. Miller).[49]

The specified considerations include not only increasing competition and providing a fair return to the Federal government, but also developing new oil and gas resources in an efficient and timely manner,

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[49] It is also significant that the legislative history refers to the systems identified in Section 8(a)(1) as those "authorized"—not "required"—for use. See, *e.g.*, H.R. Rep. No. 95-590, *supra*, at 136; S. Rep. No. 95-284, 95th Cong., 1st Sess. 46 (1977). Compare H.R. Rep. No. 95-590, *supra*, at 142, 143.

avoiding both undue speculation and unnecessary delays in exploration, development, and production, and assuring competent and safe operations (H.R. Conf. Rep. No. 95-1474, *supra*, at 92). Selection of bidding systems that are likely to further these considerations, the development of regulations for the utilization of such systems, and the testing of them in actual lease sales are the responsibilities of the Secretaries of Energy and the Interior. They are not required to promulgate regulations for, or to utilize, systems that they conclude, in the exercise of their expert judgment, will cause inefficiencies and delays in the exploration, development and production of OCS oil and gas.[50]

Respondents disagree with the selections made, and urge that other systems would better further the statutory purposes. But Congress was well aware of disagreements over the relative desirability of the various systems; that is why it required experimentation. It did not go further, and require testing of the specific systems the respondents prefer. In taking that further step, the court below exceeded its proper function, and gave respondents what they were unable to obtain from Congress. See H.R. Rep. No. 95-590, *supra*, at 117.

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[50] For the reasons explained in the preambles to the final variable net profit share and the proposed variable work commitment bidding system regulations, the Secretaries of Energy and of the Interior have serious reservations about the desirability of those systems. See App., *infra*, 1a-5a.

CONCLUSION

The judgment of the court of appeals should be vacated and the action remanded to the district court with directions to dismiss for lack of standing. If the Court considers the case on the merits, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

I. The preamble to the proposed work commitment bidding system regulation states in pertinent part (46 Fed. Reg. 20526-20527 (1981):

> While [some] beneficial impacts * * * may occur, DOE anticipates that the proposed variable work commitment bidding system may also have some negative effects on OCS exploration and development. First, although the work commitment bidding system is intended to encourage diligent exploration of OCS tracts, it is also possible that utilization of a variable work commitment bidding system could have the unintended result of encouraging "over-exploration" on a given work commitment tract, to the point where scarce physical resources [*e.g.*, drilling rigs, drill pipe, etc.] would be misutilized. In cases where "over-exploration" occurred, it could be expected that fewer scarce physical resources would be allocated to the exploration of alternative prospects. It is also possible that, in the aggregate, more OCS exploration may occur than is economically efficient.
>
> Second, the application of a variable work commitment bidding system may cause distortions in the ordering of tract development. Firms may change the order in which they would develop tracts in various OCS regions given their perception of the economic incentives or disincentives that may be inherent in the various alternative bidding systems. Other things being equal, firms may develop tracts with high cash bonus payments first, in order either to recoup expenditures early through production revenue

or to maximize tax write-offs. Since a variable work commitment system would reduce initial sunk costs, and therefore the need to recoup those expenditures, tracts leased under this system may receive a lower priority for exploration than those leased under systems that require higher front-end payments. Consequently, efficient and orderly development on the OCS may be somewhat undermined by use of this bidding system.

Third, assuming that most firms will opt to post a performance bond rather than a cash deposit for the full amount of the work commitment, a variable work commitment bidding system may lower the incentive for diligent exploration. Since the fixed cash bonus under the work commitment bidding system is expected to be lower than the front-end bonus under other bidding systems, and payment of any unfulfilled work commitment obligation is deferred, firms may tend to delay exploration of tracts leased under a variable work commitment bidding system relative to tracts leased under bidding systems without a work commitment component. This effect may be offset, however, by the tax benefits of expensing certain exploration expenditures [*i.e.*, write-offs of certain costs in the year they are incurred, rather than amortizing them over a longer time period] and of the current investment tax credit equal to 10 percent of new "qualified" investments.

Fourth, a variable work commitment bidding system may contribute to inequitable risk sharing between the government and the firms undertaking the exploration. Like other bidding sys-

tems, the work commitment bidding system could be subject to the criticism that the risks of unsuccessful exploration ventures are not adequately borne by the lessee. For example, on tracts where the results of initial exploration are favorable, the proposed system would encourage the lessee to continue diligent exploration by providing for partial reductions of the cash deposit or performance bond to help finance exploration activities. Therefore, total payments to the government would be lower under a variable work commitment bidding system than under other OCS bidding systems. It is possible, although unlikely, that the government may receive payments in excess of the amount it would have received under the traditional cash bonus bidding system. This would only occur, however, in those situations where the amount that would be paid as a bonus is small relative to the amount to be spent on exploration, and where initial exploration was decisively negative. On average, the government should expect a lower fixed cash bonus to attract a higher work commitment bid.

Finally, several other issues are to be noted. There may be significant administrative costs incurred on the part of both the government and industry associated with the utilization of a variable work commitment bidding system. The verification of exploration expenditures applied in satisfaction of the work commitment may be costly and time consuming. Consideration must also be given to the difficulty and potential costs, on the part of the government, of evaluating a firm's exploratory program and making a judgment whether to terminate the allowability of

exploration costs from a portion of a lease that may be applied in satisfaction of the work commitment prior to the expiration of the primary term of the lease.

II. The preamble to the variable net profit share bidding system regulation states in pertinent part (46 Fed. Reg. 29681 (1981)):

> [T]he most immediate effect of using the variable net profit share bidding system, in place of traditional cash bonus systems, will be a reduction in front-end cash bonuses and a consequent reduction of funds flowing into the U.S. Treasury at the time of the lease sale. The amount of any such reduction will depend upon the level at which cash bonuses are fixed for any OCS lease sale. The reduction in bonus amounts may eventually be offset, at least in part, to the extent that lessees make contingency payments during production; however, any such contingency payments would not begin for several years after issuance of the lease. It is also possible that these lower cash bonus amounts may lead to speculative bidding. These conclusions found considerable support in the public comments.
>
> To the extent that very high profit share rates are bid, DOE anticipates that minimum economical commercial field sizes may increase and that there may be premature abandonment of leases. Either of these results will lead to reduced resource recovery and losses in national income, that is, in net economic value. In addition, high profit share rates are likely to reduce the incentive for exploration and cause overin-

vestment in development after discovery of a commercial field. High profit share rates may also cause inefficient distortions in production patterns. All of these impacts will tend to reduce resource production, national income, and the Federal revenues yielded by OCS development. Further, in any bidding system where the bid variable is not a cash bonus, there is no assurance that the high bid on a tract will yield the greatest return to the public or to the government over the life of the lease.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 349221 515

Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the announced determination of the Secretary of Interior to make no use of any of the three non-bonus bidding systems among the six new systems specified by the 1978 OCSLA amendments, violates the statute's mandate that for five years the new systems "shall be applied" in OCS sales, and defeats the central Congressional objective to test systems that could enhance bidding competition and smaller company participation on the OCS.

2. Whether the Secretary's refusal to test the profit share bidding system long successfully and profitably used by California, violates the statute's requirement that leasing shall "assure receipt of fair market value" return.

3. Whether the court below correctly found that the California State offshore leasing agencies and the consumer plaintiffs suffer adverse effects and have standing to object that the Secretary is unlawfully refusing to use the new non-bonus bidding systems specified in the statutory amendments.

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS

The studied dullness of the Government's brief to this Court cannot obscure the overwhelming significance of the issue at stake. The unanimous ruling below prevents the Government's attempted nullification of the 1978 statutory reforms in OCS leasing, enacted after careful and extensive consideration and over the objections of the major oil companies. It permits accomplishment of the vital Congressional purposes of greater competition in OCS leasing and a better return to the nation for our most important natural resources, and could mean billions in revenue to the public Treasury and higher yields to plaintiff California and other states similarly situated. These beneficial effects sought by Congress and secured by the Court of Appeals now rest upon this Court's affirmance of the ruling below.

COUNTER-STATEMENT

1. When Congress enacted the 1953 Outer Continental Shelf Lands Act, it provided that offshore properties could be leased either by bidding of cash bonuses to be paid for a pre-fixed royalty lease, or by bidding of the royalty payable to the Government for a pre-fixed cash bonus lease. Few companies other than the major oil producers have the cash reserves to compete effectively in cash bonus auctions, but from the beginning the Department of Interior yielded to the demands of the major companies for exclusively cash bonus bidding. Between 1954 and 1978 nearly all the leases were thus acquired by the major oil producers, with little competitive bidding among them for individual leases. The Congressional reports noted these adverse results of bonus bid leasing and proposed the 1978 OCSLA amendments as "a new statutory regime for the management of the oil and natural gas resources of the Outer Continental Shelf" (H. Rept. 95-590, 95th Cong., 1st Sess. 53 (1977)).

2. A major factor prompting enactment of the 1978 amendments was concern over the adverse results of bonus bid leasing. For example, the House Report stated (*id.* at 47): "At present, the cash bonus system is used almost exclusively. Under that system, in order to win a lease, a company must have vast amounts of capital, and the price to the company is set without full knowledge of the value of the oil and gas in the area. This may reduce competition for offshore leases to the major oil companies and reduce the public return for resources." The Report concluded (at 54) that "there is now doubt whether cash bonus bidding remains the best system for the future," and that there was therefore a need "to authorize alternative leasing arrangements and require experimentation with them." The Senate Report evidenced identical concerns (S. Rept. 95-284, 95th Cong., 1st Sess. 46 (1977)).

3. Hopeful that new untried leasing methods would prove more beneficial, in Section 205(a)(5)(B) Congress mandated a five-year experimental leasing program wherein annually "the bidding systems authorized by paragraph (1) . . . *shall be applied* to not less than 20 per centum and not more than 60 per centum of the total area offered for leasing . . ." (43 U.S.C. § 1337(a)(5)(B), emphasis supplied). In addition to the traditional bonus bidding system, the statute sets forth three new systems still using bonus bidding and three new systems using other bid elements (43 U.S.C. § 1337(a)(1)). The new *non-bonus bid systems* include 1) royalty bidding for fixed cash bonus leases (Section (a)(1)(B)), work commitment bidding for fixed cash bonus leases (Section (a)(1)(G)), and net profit share bidding for fixed cash bonus leases Section (a)(1)(D)). The last of these is the system California has successfully used for over 30 years, with far greater public returns than the Federal Government has received under bonus bid leasing (see H. Rept. 94-1084, 94th Cong., 2d Sess. 249-50 (1976)). Congress also adopted a requirement (43 U.S.C. § 1344(a)(4)) that OCS leasing activities "shall be conducted to assure receipt of fair market value"—a requirement which responded to a series of critical Comptroller General reports issued between 1975 and 1978 (see Appendix C *infra* p. 4a), finding that in view of the tepid bid competition for leases having no reliably predictable resource value, there was no assurance that fair public return was obtained from bonus bid leasing.

4. Nine months after enactment of the 1978 provisions no new bidding system regulation had issued, and DOI continued with its exclusively bonus bid leasing. When it thus appeared that the experimental leasing program might be defeated by administrative inaction, California oil lands authorities and consumers of oil joined as plaintiffs in bringing this suit to compel issuance and use of regulations for the important new leasing systems. Plain-

tiffs immediately sought a preliminary injunction urging that the statute's "fair market value" requirement was being violated by continued use of unprofitable bonus bid leasing instead of resort to the profit share bidding by which California has achieved greater public returns. On December 20, 1979, after the Government represented that new bidding regulations were soon being issued, the Court of Appeals declined to grant preliminary relief to plaintiffs. However, the Court warned that further delay in issuing the new regulations "may constitute a violation of the OCS Act amendments" (Petition for Certiorari, App. D at 97a).

5. Thereafter it became clear that there was not only further delay but outright defiance by defendants, for in 1980 the Government confessed that it had no plans at all for using any non-bonus bid leasing or even for issuance of the profit share bidding regulations (*id.*, App. A at 19a-20a). Accordingly, on October 30, 1980 the Court of Appeals found that the Government's refusal to publish regulations for the new non-bonus bid leasing systems was an abuse of discretion which frustrates the essential purposes of Congress in mandating an experimental program to test important new bidding systems (*id.* at 2a). In particular the Court found that to meet the central purpose of the experimentation mandate, the Secretary cannot confine testing to the bonus bid options (*id.* at 29a, 31a, 41a), and that at least profit share bidding must be tested in good faith during the five year program (*id.* at 44a-46a, 47a). The Department of Energy has since promulgated the regulations for two new non-bonus systems; the profit share bidding regulation was published on June 2, 1981 (46 Fed. Reg. 29680) and the work commitment bidding regulation was issued on July 9, 1981 (46 Fed. Reg. 35614).

6. In the fourteen OCS lease sales held during the three years since enactment of the 1978 reforms, the traditional cash bonus system and three bonus bidding

variants which DOI has used have not at all increased bidding competition or decreased the domination of the leases by the major oil companies. See Appendix A *infra*, p. 1a. Nevertheless, after this Court granted review Secretary Watt announced on May 8, 1981 (see Appendix B *infra*, p. 2a) that he will not in fact use either profit share bidding or work commitment bidding. Since DOI had earlier already concluded (see Petition for Certiorari, App. A at 19a, n. 44) that it would not use the third non-bonus bid system (royalty share bidding), this means that *unless the ruling below is affirmed there will be no non-bonus bid leasing at all during the entire five year experimental program.* The remaining two years would pass with the entire experiment—encompassing six new bidding systems identified by the statute—confined to varieties of bonus bid leasing to the exclusion of the three specified non-bonus bidding systems. We show in the Argument that such a curtailed resort to the new bidding systems specified by the statute defeats the important OCSLA reforms enacted in 1978.[1]

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[1] Contrary to the Government's claim, no question is now presented concerning defendants' duty to issue regulations. Plaintiffs' motion below sought an order for issuance of the profit share bidding regulation and its good faith use by the Secretary of Interior (see Amended Order attached to Plaintiffs' July 14, 1980 memorandum in the District Court). That is the promulgation and use which the Court below ordered (see Petition for Ceritorari, App. A at 49a, 44a-46a). Pursuant to a consent order entered by the District Court on December 19, 1980, the profit share bidding and work commitment bidding regulations have been finally promulgated. The only substantive question thus left for review arises from defendants' continued defiance of the lower court's ruling that the Secretary cannot confine the test program to bonus bidding systems, and must at least make good faith use of the net profit share bidding system.

SUMMARY OF ARGUMENT

I. *The Secretary's rejection of all three non-bonus bidding systems designated by the Congress violates the OCSLA requirement that the new bidding systems "shall be applied" to OCS sales during a five year experimental period.* Broad experimentation with the new systems was mandated by the statute, which commands that for five years, within annual minimum and maximum percentage limits the newly authorized systems "shall be applied" in OCS sales. That command does not permit rejection of half the new leasing systems without testing. The Senate Report explained the purpose to authorize new leasing systems and "require their use on an experimental basis", and to "assure" that these alternatives "will be used" and "would be tried." The House Report similarly described the purpose to "require experimentation" with the new systems, "mandating use of new systems, to insure they are tested and studied." The Conference Report likewise underscored that the new systems "are to be utilized" in all OCS areas for five years. The Secretary's refusal to test the non-bonus bidding half of the six new leasing systems also violates the expressed Congressional intent *to test the relative virtues of bonus and non-bonus bidding.* The House Report sought to compare results from "areas to be offered under a bonus bid system and those which would be offered under a non bonus bid system". The Conference Report likewise explained the need for testing "relative advantages and disadvantages of the various bidding systems, including the front-end bonus systems . . ."

The statute and its consistent legislative history thus repel the Secretary's contention that he has "discretion" to refuse to test any of the non-bonus bidding systems. For the discretion left the Secretary was not *whether* to test the new systems but only *where and when* to apply particular new systems to particular lease areas and tracts. Thus, the House Committee noted its intention

by the use of the new bidding systems "to determine what system or systems, in what situations, provide the best means to lease our federal resources in the Outer Continental Shelf." Similarly, the Conference Report explained that in requiring use of "a fair selection of different methods on different tracts," the intent was to assure adequate information on the advantages of various bidding systems "as applied to different types of tracts, having different expectations of the amount of hydrocarbons that can be recovered."

The Secretary's exclusive continued recourse to bonus bidding instead of using the new non-bonus bidding systems also defeats the expressed *objective* of the experimental program. Finding that there was inadequate competition under bonus bidding, and that smaller companies are precluded from succeeding in view of the onerous front-end bonus requirement, Congress sought testing of new systems which would increase competitive bidding and reduce domination of OCS leases by the major oil companies. That objective is totally defeated by the Secretary's rejection of the non-bonus bidding systems that could promote more bidding and participation by smaller companies. The Secretary's rejection is the less defensible considering that his use during the last three years of only bonus bidding options has yielded no improvement whatever in competition for the leases, no reduction in their domination by the major oil companies, and thus no progress in meeting the central purpose of the mandated experimental program.

II. *The Secretary's refusal to test the profit share bidding system is particularly unjustifiable in view of the statute's fair market value requirement.* The express requirement of the statute that leasing "shall be conducted to assure receipt of fair market value for the lands leased and the rights conveyed" cannot be met as long as the Secretary refuses to test the profit share bidding system which has long been used successfully

by California and with far greater public returns than bonus bidding has achieved for the Federal Government. The assured fair return requirement of the statute was a response to a series of five GAO reports preceding enactment of the statute; they emphasized repeatedly that given the unknown ultimate resource value of the properties, in the absence of active competitive bidding there is no assurance that the public receives a fair return from bonus bid leasing. The inadequate competition for bonus bid leases highlighted by the GAO has not at all improved since 1978. Yet the Secretary refuses to use or even test the profit share bidding system from which California has been realizing 25 cents more on each dollar of oil and gas revenue than the Federal Government realizes from bonus bid leasing. The Secretary's failure to test this most promising and established non-bonus bid system violates the statute's requirement that his leasing activities shall "assure" fair market value return for the public.

III. *Defendants' violations cause tangible injuries to plaintiffs which give them standing to seek relief under the statute's "Citizens Suits" section.* The liberal citizens suits provision of the statute authorizing suit by a person with an interest which "may be adversely affected" was intended to keep administrators "on their toes" by authorizing any interested party to vindicate the requirements of the statute. As a partner in federal lease revenues in OCS "drainage" situations, the California State plaintiffs have a direct monetary interest in the testing of new leasing systems expected to yield greater revenues. The same California plaintiffs also have standing as competitors with the Federal Government in the leasing of offshore properties, because the federal bonus bid leases, yielding far smaller payments by the lessee to the government from his oil and gas production, make it increasingly difficult for California profitably to lease its own properties and to maintain production and prices on its leases. Finally, the consumer plaintiffs also have standing because

they are denied the competition-promoting benefits which Congress sought by the new leasing systems, and because the major oil companies who acquire most of the bonus bid leases have a demonstrated capacity and tendency to hoard them with a consequent continuing threat of gasoline shortages adversely affecting the consumer plaintiffs.

ARGUMENT

I.

THE SECRETARY'S REFUSAL TO TEST ANY OF THE NON-BONUS BID SYSTEMS SPECIFIED BY THE STATUTE VIOLATES THE OCSLA'S MANDATE THAT THE NEW LEASING SYSTEMS SHALL BE APPLIED IN OCS SALES DURING THE FIVE YEAR EXPERIMENTAL PERIOD

The language, structure, and legislative history of the OCSLA amendments establish that there is an inescapable obligation upon the Secretary of Interior to experiment with leasing by non-cash bonus bidding. After 25 years of bonus bid leasing it had become clear by 1978 that the onerous front-end cash barrier severely limits the number of bidders and results in capture of most leases by the major oil companies, leaving no assurance that the public even receives a fair return for its immensely valuable resources.

To promote more active bidding and smaller company access to the OCS, the 1978 amendments identify six new leasing systems for testing and command that they "*shall be applied*" during a five year period of experimentation. Congress particularly sought to compare the results from new non-bonus bidding with the results from bonus bidding, in order to identify the systems best suited for use on particular offshore properties. We proceed to review the relevant legislative background and Congressional reports, which underscore that the Secretary's refusal to test any of the non-bonus bidding systems violates the

experimentation mandate of the statute and defeats its central remedial objective.

A. Leasing History

After rulings of this Court in the 1940s had upheld federal ownership of the outer continental shelf, Congress enacted the 1953 Outer Continental Shelf Lands Act and provided therein for alternative means of leasing. One option was the use of cash bonus bidding, by which the highest cash bidder acquires the lease and then pays the Government a fixed royalty representing a portion of the oil and gas he derives from the lease. A second basic alternative under the statute—which DOI has eschewed ever since 1953—was leasing to the bidder offering to the Government the highest rate of royalty return on his oil and gas production. Instead of royalty bidding, from the beginning in 1953 the Department of Interior chose bonus-bid leasing of OCS property with the same 16⅔% royalty rate previously used in onshore leasing.

In opting for bonus bid leasing of OCS properties of uncertain but potentially enormous oil and gas value, DOI followed the expressed preference of the major oil companies.[2] Thereby DOI rejected the alternative route which had already produced noteworthy benefits for the State of California. Congressional testimony by Attorney General Tom Clark had pointed as early as 1948 to the successful results of California's profit share leasing and urged its federal emulation (Title to Submerged Lands Beneath Tidal and Navigable Waters: Hearings on

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[2] From the first, these companies pressed for use of the cash auction system which most advantages them and eliminates smaller bidders. Thus, the President of Humble Oil testified that:

> "[1] leases should be awarded to responsible and qualified bidders upon the basis of the highest bonus payment offered. Rentals and royalties should not be subject to bidding but should be uniform and fixed in all leases." Hearings on H.R. 5991 and H.R. 5992 Before the House Judiciary Committee, 81st Cong., 1st Sess. 151 (1949).

S. 1988 and Similar House Bills Before the Senate Committee on the Judiciary and the House Committee on the Judiciary, 80th Cong., 2d Sess. 685). California has long experienced through use of royalty and profit share bidding a net return on the resulting leases representing nearly 50% of the oil and gas production value (JA 51-53). Under the bonus bid leasing DOI used in some 40 OCS lease sales held between 1953 and 1978, the United States realized far less return: about a 35% net return on oil and gas production leases before the 1970s; less than 30% on leases awarded since 1972; and from recent sales a federal return of only 22% (JA 125-45; 188-91; 206-23). The continuously declining federal return from bonus bid leasing reflects the astronomical rise in oil and gas prices which commenced at the beginning of the 1970s. The price rises have rendered the cash bonuses bid at the front end of the lease increasingly less valuable, adding constantly less to the basic fixed royalty rate.

In addition to diminishing public returns, bonus bidding had yielded little bid competition and much domination of OCS leases by the largest companies. In lease sales held prior to 1972 the average number of bids per tract offered was 1.71 (JA 40-41); per tract bid upon the average was only 3.5 (*id.*); and over 80% of all leases were acquired by the nation's twenty largest oil producers (JA 43-44). In sales between 1972 and 1978 the number of bids per tract offered declined to 1.26; per tract bid upon they decreased to 2.77; and the top 20 producers acquired between 67 and 87 percent of the tracts (JA 41-42, 44). Indeed, in the five years from 1968 to 1972 the twenty majors acquired successively 94%, 100%, 82%, 100% and 77% of the OCS leases sold (JA 44). These results were exacerbated in the 1970s, when vast increases commenced in DOI's annual leasing of OCS properties at the same time that oil and gas prices started on their escalating course—a course which since 1972 has multiplied tenfold the market value of crude oil and natural

gas. As a consequence of rising cash bonuses for increasingly valuable federal resources sold in larger quantities, competition for leases further declined and major oil company domination was further enhanced (JA 41-42).

Inadequate public return, weak bidding competition, and major company domination of OCS lease acquisitions were thus demonstrated by the time of the 1978 statutory reforms. They were central themes in the Congressional hearings and subsequent Committee Reports.

B. The Congressional Hearings

Congressional consideration of the OCSLA revisions commenced in the 93d Congress, when the Senate passed a bill in 1974 which provided, inter alia, for changes in the bidding system (see H. Rept. 94-1084, at 70-71 and H. Rept. 95-590, at 95). In the 94th Congress, the Senate passed a comprehensive bill (S. 521) providing for new methods of OCS leasing to be used in at least half of frontier area sales. The House meanwhile had created a special Ad Hoc Select Committee on the Outer Continental Shelf to consider a variety of major OCS reform proposals, and the House passed a bill to this end, H.R. 6218. A Conference Report issued on Sept. 20, 1976 but the Congress terminated without taking action (see H. Rept. 95-590, at 96-98).

Numerous hearings were held between 1975 and 1977 before the committees of both houses (see S. Rept. 95-284, at 68-70 and H. Rept. 95-590, at 95-100). A central theme of the testimony by proponents of reform was the low level of bonus bid competition, and the capture of most of the cash bonus leases by the major oil companies. The House Reports specifically noted such testimony by New Jersey Governor Byrne, by the American Gas Association, by the Associated Gas Distributors (H. Rept. 95-590, at 117) and by California Lands Com-

mission Chairman Cory (H. Rept. 94-1084, at 249).[3] Furthermore, a series of five GAO reports issued between 1975 and 1978 emphasized doubts about the adequacy of competition for and public returns from bonus bid leasing (Appendix C *infra*, p. 4a).

The testimony of the witnesses persuaded the Congressional leaders. Senator Jackson, a leading proponent of the 1978 amendments, testified that "the net profit-sharing approach offers the greatest or best basis of equity as far as the taxpayers of this country are concerned"

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[3] Governor Byrne testified in 1977 that failures in then existing OCS law and its implementation included a "failure to promote effective competition, and to open up the market for offshore resources to companies other than the oil giants" (Hearings on H.R. 1614 Before the Ad Hoc Select Committee on Outer Continental Shelf, 95th Cong., 1st Sess., pt. 2, at 991 (1977)). He urged the adoption of "alternative techniques that would eliminate the large, up-front bonus bid" in order to increase competition and ensure a "full and fair return to the U.S. Treasury" (*id.* at 994).

Chairman Cory of the California Lands Commission testified that the bonus bidding system had confined to a few large companies competition for offshore production and drilling rights (Hearings on H.R. 6218 Before the Ad Hoc Select Committee on Outer Continental Shelf, 94th Cong., 1st Sess., pt. 2, at 1385-86 (1975)). He supported the flexibility in choice of contracting arrangements provided by the new legislation, commending the specific benefits that had accrued to the State of California from profit-sharing (*id.* at 1392-93).

Spokesmen for both the American Gas Association and for the Associated Gas Distributors urged that competition be broadened by this means to permit the participation of smaller companies (Hearings on H.R. 1614, pt. 2, at 959, 961; and at 1078, 1079; Hearings on H.R. 6218, pt. 1, at 539, 541, 544-45; Hearings on S. 9 Before the Committee on Energy and Natural Resources, 95th Cong., 1st Sess. 395, 400 and 640-41 (1977)). Spokesmen for the Associated Gas Distributors argued that the cash bonus method "severely limits the number of companies which can enter the offshore area" because "there are simply not that many companies that can afford the cost of admission" (Hearings on H.R. 6218, pt. 1, at 541). They urged the use of net profit sharing as promoting competition and assuring the highest return to the public (*id.* at 541, 546).

(Hearings on H.R. 6218, pt. 1, at 371). Chairman Murphy of the House Committee expressed the view that "front-end bonus bids are anticompetitive" (Hearings on H.R. 1614, pt. 1, at 667).

C. The Congressional Reports

In the 94th Congress, reports were issued, and favorable action was almost achieved on bills requiring use of new bidding systems. Senate Report 94-284 (94th Cong., 1st Sess. 37 (1975)) explained:

> "The Committee wants to authorize lease allocation systems that would encourage the widest possible participation in competitive lease sales consistent with receipt by the public of fair market value for its resources. Testimony before this Committee and elsewhere has revealed general acceptance of the proposition that high bonus bids have created a barrier to the entry of small and medium size oil firms to the OCS arena. The Committee believes that net profits share and other arrangements can be effective in shifting government revenue away from initial bonuses and into deferred payments made out of a leaseholder's profits based on actual production of oil or gas."

The House Report (94-1084, at 43) set forth the function of the new leasing systems:

> "At present, the cash bonus system is used almost exclusively. Under that system, in order to win a lease, a company must have vast amounts of capital, and the price to the company is set without full knowledge of the value of the oil and gas in the area. This may reduce competition for offshore leases to the major oil companies and reduce the public return for resources. To increase competition for offshore leases and secure higher returns to the public Treasury, Section 8 of the Outer Continental Shelf Lands Act has been amended to allow the Secretary to use seven other bidding methods based on net profits; royalty; or percentages of a lease area (Phillips

Plan). The Secretary is required to choose the new bidding systems in at least ten percent of all lease sales in frontier areas during the next five years."

When the 94th Congress expired without final action, the legislation was promptly reintroduced in the 95th Congress with no significant change in the new bidding system provisions, and favorable committee reports were soon issued in both houses. Stating (S.Rept. 95-284 at 43) that the bill authorizes new leasing systems "*and require*[*s*] *their use on an experimental basis*," the Senate Report gave this explanation of the new systems (*id.* at 46-47):

> "S. 9 authorizes a wide variety of new bidding systems. These are designed to reduce the front end cash bonus, increase the government's return on actual production of oil or gas, make it easier for smaller companies to enter the OCS development business, and increase the availability of funds for exploration.
>
> Section 205 sets forth procedures for utilizing the various bidding alternatives authorized. These alternatives may not be the "perfect solution". However, they should facilitate entry into the OCS development business of more independent producers and are certainly worth trying on an experimental basis.
>
> In order to assure that these alternatives will be used, the bill limits the Secretary's authority to use the cash bonus-fixed royalty system which has been the historical method of OCS bidding to not more than two-thirds of the tracts offered each year. . . .
>
> Section 205 revises bidding systems to encourage entry of new competitors, especially small independent operators."

As the Senate Report further explained (at 73):

> "The basic thrust of all these new options is to reduce the reliance on large front-end cash bonuses as the means of obtaining a fair price for the public's property. The committee wants to authorize lease allocation systems that would encourage the widest

possible participation in competitive lease sales consistent with receipt by the public of fair market value for its resources. The committee believes that net profits share and other arrangements can be effective in shifting Government revenue away from initial bonuses and into deferred payments made out of a leaseholder's profits based on actual production of oil or gas.

. . .

New paragraph (6) of subsection 8(a) limits the use of the cash bonus bid with fixed royalty systems to not more than 66⅔ per centum of the area offered for lease each year in the regions where there has been no previous development of oil and gas.

. . .

The committee included this limitation to assure that the new leasing systems would be tried."

House Report 95-590 similarly found (at 148) that independent oil and gas producers "presently cannot reasonably assume the risks involved in bonus bidding—paying large cash sums in advance with no assurance of recovery of oil or gas." The Report noted (at 138-39) that "[w]itnesses before the committee indicated that the high front-end bonus bids may have created a barrier to the entry of small and medium-sized oil firms as well as other potential exploiters, to the OCS activity, and that these types of bids do not, after the completion of exploitation of a lease area, provide a fair return to the Government." [4]

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[4] Similar to that finding was a contemporaneous explanation in a memorandum to the Secretary of Interior from the Deputy Assistant Secretary on August 15, 1977, at 4-5, attached to defendants' June 23, 1980 Motion for Summary Judgment:

"There is considerable support for this [bonus bidding] system by the larger oil companies. This is the case for several reasons:

. . .

However, a number of shortcomings of the present cash bonus bidding system have been identified. These include the following:

The Report thus concluded (at 54) that "there is now doubt whether cash bonus bidding remains the best system for the future" and explained that one purpose of H.R. 1614 *"is to authorize alternative leasing arrangements and require experimentation with them."* It emphasized (at 47) that the new leasing systems were intended to "increase competition for off-shore leases":

> ". . . At present, the cash bonus system is used almost exclusively. Under that system, in order to win a lease, a company must have vast amounts of capital, and the price to the company is set without full knowledge of the value of the oil and gas in the area. This may reduce competition for offshore leases to the major oil companies and reduce the public return for resources. To increase competition for off-shore leases and secure higher returns to the public Treasury, section 8 of the Outer Continental Shelf Lands Act has been amended to allow the Secretary to use other bidding methods based on net profits; royalty; or work commitments stated in dollar amounts. The Secretary is required to choose the new bidding systems in at least 50 percent of all lease sales in frontier areas during the next 5 years . . ."

Further explanation (at 50) of the new bidding systems was given as follows:

> ". . . many elements of the energy industry will now have an opportunity for involvement in OCS

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1. Many of the smaller and even some of the medium-sized firms limit their participation because of the high risks associated with the loss of their cash bonus if a tract is dry.

2. Those firms that do participate can be expected to submit bids that are considerably less than their estimates of the true value of the tract. They do this to take into account the fact that if they win the tract, they will have been the most optimistic bidder, i.e., they may have made the biggest error in overestimating the tract's value. Also, this strategy provides the winning firm with an additional return to cover the cost of considerable risk that it must bear at a royalty rate of only one-sixth."

activities. New bidding systems, reducing the need for large up front bonus payments, should allow more companies to secure OCS leases and allow all companies to use capital to explore resources."

Finally the Report (at 139-40) made clear the intended "mandate" to test systems other than bonus bidding, to compare the results with bonus bidding:

> "It was the intention of the committee that there be a clear mandate given to the Secretary to require him to use bidding systems other than the cash bonus bid . . .
>
> . . . the committee desired not to give preference to any class or type of bidders for any lease tracts. Some witnesses were concerned that use of bonus bid systems or nonbonus bid systems by the Secretary in any particular area might effectively bar aggressive competition.
>
> By selecting the 'best tracts' for offering under bonus bid systems, or for offering under nonbonus bid systems, he could limit the ability of some companies to participate in lease sales for these 'best tracts.' To avoid such a possibility, the committee, in paragraph (6) required that, generally, he randomly select those areas to be offered under a bonus bid system and those which would be offered under a nonbonus bid system.
>
> . . .
>
> The obvious intention of the committee in revising the procedures for use of new bidding systems is to determine what system or systems, in what situations, provide the best means to lease our federal resources in the Outer Continental Shelf. Subsection (a) is intended to provide procedures to answer this question. In addition to mandating use of new systems, to insure they are tested and studied, and to providing for random selection, to insure fair tests and studies, this subsection details four additional techniques to insure use of the best systems in the best places."

Randomization was not approved in conference, but the Conference Report (H. Rept. 95-1474, 95th Cong., 2d Sess. 92 (1978)) specified that:

> "Although there is no requirement for random selection, the Secretary, in setting forth systems for use on tracts, shall seek to secure a fair selection of different methods on different tracts. The purpose of such a selection is to assure that adequate information is obtained as to relative advantages and disadvantages of the various bidding systems, including the front-end bonus bid systems, as applied to different types of tracts, having different expectations of the amount of hydrocarbons that can be recovered."

Finally, in mandating new leasing systems which minimize front-end bonuses that inhibit competition and smaller company access, Congress disclosed the specific intent to end domination of leasing policy by the large oil companies. Noting (at 54) that "federal administration of the leasing program and federal regulation of offshore oil and gas development have been essentially a closed process involving the Secretary of the Interior and the oil industry," the House Report concluded (H. Rept. 95-590, at 103):

> "It is today's reliance, and tomorrow's dependence on OCS resources that demonstrates the need to reform OCS procedures and to provide new protections.
>
> The committee found that the present law's grant of total discretion to the Secretary led to a situation where the petroleum industry had until recently, as will be discused later, a too dominant voice in the setting of policy.
>
> . . .
>
> It is clear that the pattern of Government-industry relationships which have been developed, produced a very closed system for making and administering OCS policies. It is the closed character of this system which is being challenged at the present time.

> Witnesses this year confirmed this conclusion and further stressed that this dominant voice was, in fact, limited to the larger oil companies. Under the present law's bid system, representatives of the American Gas Association testified the larger energy companies were able to totally dominate leasing."

Soon after this expression of Congressional concern, a memorandum of October 31, 1977 to Interior Secretary Andrus from the Deputy Under Secretary warned of the big companies' dislike for and their power to delay utilization of new bidding systems (J.A. 261).[5] This DOI memorandum was prophetic. Four years since its warning was given and three years since the new statute was enacted, the Department of Interior continues to use *exclusively* bonus bid leasing, thus violating the clear requirements of the 1978 amendments.

D. The Secretary's Violation of the Law

The statutory text and its consistent legislative history repel the Secretary's contention that he has discretion to refuse to test any of the three non-bonus bidding leasing systems among the six systems Congress specified for use in the experimental program. For the discretion left the Secretary was not *whether* to test promising new leasing systems, but only *where and when* to apply a

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[5] The memorandum stated that "There is no question and no dispute about who was responsible for the Rules Committee's action [delaying action on H.R. 1614]—the major oil producers. It is a rather timely follow-up to the President's comments on their role in the Senate on the energy legislation. In my view, despite all the rhetoric about "nationalized oil" and "delays," what the big companies really dislike in H.R. 1614 is new bidding systems. If they can delay enactment of the bill past March, after the George bank and South Atlantic sales, they will have bought the first three prime frontier offerings on the east coast (including Baltimore Canyon) under primarily bonus bidding. You may recall that in the Baltimore Canyon Sale, Exxon, bidding alone, won fully one-third of the leases sold." It is noteworthy that of the 15 companies that appeared in 1981 to file protests against DOE's proposed profit share bidding regulation, 14 firms were among the nation's twenty largest oil companies.

particular new system to particular lease areas and tracts. Thus, the House Committee (*supra*, p. 18) noted its intention by the new bidding systems "to determine what system or systems, in what situations, provide the best means to lease our federal resources in the Outer Continental Shelf." The Conference Report (*supra*, p. 20) similarly explained that in requiring "a fair selection of different methods on different tracts" the intent was to assure that adequate information is obtained "as to relative advantages and disadvantages of the various bidding systems, including the front-end bonus bid systems, as applied to different types of tracts, having different expectations of the amount of hydrocarbons that can be recovered." These expressions confirm the Government's own conclusion (Brief, at 16) that the Secretary has "*discretion in determining when and where to make use of alternative systems . . . .*" But they nowhere suggest that the Secretary also has discretion not to use half of the six new bidding systems, including all those that do not use cash bonus bidding as the method of lease award. Far from any such discretion not to experiment, we demonstrate that both the command to test and the clearly expressed objective of that command preclude the Secretary's renunciation of non-bonus bidding:

i. *The Secretary is violating the statute's express direction that the new systems "shall be applied" for five years.* The statute and the legislative reports bar the Secretary's renunciation of all non-bonus bid leasing during the experimental period, for they both define the new leasing systems and compel their use. The command of 43 U.S.C. § 1337(a)(5)(B) that the new systems "*shall be applied*" for five years, is buttressed by repeated emphasis in the Congressional reports on the compulsion to use the new systems. At the outset, the Senate Report explains that the legislation authorizes new leasing systems and "*requires their use on an experimental basis*" (*supra*, p. 15). The Report goes on to emphasize the intent "*to assure that these alternatives will be used,*"

and *"to assure that the new leasing systems would be tried"* (*supra*, p. 16). The House Report was to the same effect, explaining that the bill's purpose was to authorize alternative leasing arrangements and *"require experimentation with them"* (*supra*, p. 17), thus *"mandating use of new systems, to insure they are tested and studied"* (*supra*, p. 18). The Conference Report (H. Rept. 95-1474, at 92) equally emphasized that the new bidding systems *"are to be utilized"* in all OCS areas for five years. This clear Congressional mandate for broad experimentation with the new bidding systems entirely repels the Secretary's renunciation of all three of the six new bidding systems not based on cash bonus bidding.[6]

Moreover, the Secretary is also nullifying the expressed Congressional intent that the experimentation include a comparison of results from bonus bid and non-bonus bid leasing. The House Committee emphasized

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[6] The floor debates equally indicate that Congress intended to require the Secretary to experiment with the alternative leasing systems. Rep. Brown, an opponent of the experimentation mandate, stated at 124 Cong. Rec. H425 (daily ed. January 31, 1978):

> "In the place of the bonus bid system, the legislation would require the Secretary of the Interior to experiment with seven new systems and in addition would allow the Secretary to establish any other bid system at his discretion."

Rep. Murphy, Chairman of the committee and floor manager of the bill, stated at 124 Cong. Rec. H189 (daily ed. January 25, 1978):

> "H.R. 1614 would provide alternative leasing arrangements and would require the Department of the Interior to use them during the next 5 years so that we may work out the best arrangements for the future."

Another Congressman indicated that, in his understanding, the Act would be "requiring that a variety af new leasing arrangements be tried, in lieu of the traditional cash bonus system." 124 Cong. Rec. H286 (daily ed. January 26, 1978) (remarks of Rep. Gonzalez). "We have clearly stated that Congress wants the Secretary to try in a meaningful fashion the alternative bidding systems." 124 Cong. Rec. H426 (daily ed. January 31, 1978) (remarks of Rep. Hughes). See also citations by the lower court, Petition for Certiorari, App. A at 33a, n.70.

that for comparison purposes the Secretary was to select areas "to be offered under a bonus bid system and those which would be offered under a non-bonus bid system" (*supra*, p. 18). The Conference Report similarly emphasized that the purpose of the mandated "fair selection of different methods on different tracts," was to assure that adequate information is obtained "as to relative advantages and disadvantages of the various bidding systems, including the front-end bonus bid systems . . ." (*supra*, p. 19). The Secretary's renunciation of all non-bonus bid systems precludes the congressionally intended comparison of the results of bonus bid and non-bonus bid leasing.

The Secretary's violation of the specific testing requirements of the experimental leasing program is thus clear. In addition, as we next point out, the Secretary's refusal to use non-bonus bidding also defeats the chief statutory objective underlying the mandated experimentation.

ii. *The Secretary is defeating the Congressionally-specified objective of the experimental program.* The House and Senate reports repeatedly expressed doubts about the adequacy of lease competition under bonus bidding (because the large front-end bonus requirement tends to exclude smaller bidders), and emphasized that the testing of new methods was to promote increased bidding competition and permit smaller firms to participate on the OCS (see *supra*, pp. 14-18). As the court below concluded (see Petition for Certiorari, App. A at 41a) the new non-bonus bidding systems "when tested may prove unsatisfactory, but it is not credible that the Secretaries can permissibly reject them out of hand, when the statutory history is explicit regarding Congressional interest in maximizing competition and encouraging 'the widest possible participation' in lease sales." In totally rejecting testing of non-bonus bidding systems, the Secretary is rejecting the very systems which could achieve the Congressional objective of increasing bidding compe-

tition and smaller bidder access. For it is those options that eliminate the onerous front-end bonus requirement which Congress found to limit the number of bidders and restrict success for smaller companies. As conceded in DOE's recently published regulation for profit share bidding (46 Fed. Reg. 29681), which Secretary Watt refuses to use:

> "In amending the OCSLA to provide for new bidding system alternatives, Congress intended, in part, to encourage greater competition for OCS leases. . . . The variable net profit share bidding system may in practice encourage more participation in OCS lease sales by a more diverse range of firms. Participation in OCS lease sales may be viewed in terms of an increase in the overall number of bids in an OCS lease sale, in the number of bids per tract, or in the number of sale participants. In the sense that greater participation may be considered a measure of competition for OCS leases, this regulation should lead to increased competition." [7]

Moreover, examination of the fourteen OCS lease sales held by DOI since the adoption of the 1978 amendments—all using varieties of cash bonus bidding—shows that cash bonus bidding varieties have yielded no improvement either in the competition for leases or the success rate of the smaller bidders (see Appendix A *infra*, p. 1a). The fourteen sales have used 1) bonus bidding with 16⅔% royalty, 2) bonus bidding with sliding

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[7] Similarly, DOE has recently recognized competition enhancing virtues of the work commitment bidding system, which the Secretary of Interior likewise refuses to use. In DOE's regulation for that system it states (46 Fed. Reg. 35623):

> "DOE's analysis indicates that in certain cases, on a tract by tract basis, use of the variable work commitment bidding system may enhance competition. In moderate cost regions where high cash bonus bids have been perceived as representing a barrier to entry for small firms, use of the variable work commitment bidding system with a low-fixed cash bonus may stimulate competition."

scale royalty, 3) bonus bidding with 33⅓% royalty and 4) bonus bidding with fixed profit share. The overall result has been no better than pre-1978 bonus bidding . The average number of bidders per tract offered was 1.71 before 1972, 1.26 between 1972 and 1978, and is 1.6 since 1978; average bids per tract "bid upon" were 3.5 and 2.77 before compared to 3.0 since 1978; and the top 20 oil producers who captured 80% of the pre-1978 leases have acquired 80.6% since 1978. What is shown by the overall results of continued bonus bid leasing since 1978 is also shown for each of the four varieties of bonus bidding which DOI has used (see Appendix A *infra*, p. 1a).

In sum, as one would have expected, varieties of bonus bid leasing used by DOI since the 1978 Amendments have shown the same low levels of competition and the same domination by the largest oil producers which induced Congress to mandate the program of experimentation with new bidding systems to induce improvement. The Secretary's refusal to test the new non-bonus bid systems leaves the statute's experimentation mandate in shambles. The central purpose of the testing program—whose adoption involved the creation of a special committee in the House, voluminous hearings in both houses, and the concurrence of both houses in two consecutive Congresses before the legislation was finally adopted in 1978—will go for nought if the Secretary's stonewalling succeeds.[8]

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[8] In answer to the clear violations demonstrated, the Solicitor General suggests that the "plain meaning" of the statute bars grant of relief. But far from a plain meaning to grant unrestricted discretion to the Secretary, the statute and the reports both expressly state that the new systems "shall" be used in a broad experimental program comparing the results of bonus and non-bonus bidding. Moreover, this Court has frequently refused to construe statutory text in a manner which would defeat the basic purposes of the legislation disclosed by the legislative reports. As recently as last April a "plain meaning" contention by the same Department was rejected in *Watt* v. *Alaska*, 101 S.Ct. 1673, 1677-78 as follows:

Indeed, the Secretary's nullifying stance violates even the expressed intent of the Executive Branch. Prior to the enactment of the legislation Secretary Andrus repeatedly promised that DOI would make full resort to the new leasing systems (see Petition for Certiorari, App. A at 27a, n.60 and 44a, n.91). In supporting the 1978 legislation the President stated that the amendments would require a flexible leasing program "using bidding systems that will enhance competition" and provide other public benefits (H. Rept. 95-590 at 115). The Executive Branch having expressed its concurrence in the new legislation, and having promised to test new bidding systems in full for the improvement of competition in leasing and other intended benefits, the present Secretary's effort to abort the experimental program is specially inappropriate. As a party to the enactment of the 1978 reform legislation the Executive is in no position to renege before the courts on its pre-enactment support and its commitments to honor the mandate for full experimentation with the new bidding systems.[9]

"We agree with the Secretary that "[t]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (POWELL, J., concurring). See *Rubin* v. *United States*, —— U.S. ——, 101 S.Ct. 698 (1981). But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 10; *United States* v. *American Trucking Assns.*, 310 U.S. 534, 543-544 (1940). This is because the plain meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand Co.* v. *United States*, 278 U.S. 41, 48 (1928) (Holmes, J.). The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect. E.g., *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892); *United States* v. *Ryan*, 284 U.S. 167, 175 (1931)."

[9] The reason for the Executive Branch renig is plain. The big oil companies' passion for bonus bidding is shared by Administrations concerned to maximize present federal revenues through

II.

THE SECRETARY'S REFUSAL TO TEST THE PROFIT SHARE BIDDING SYSTEM IS PARTICULARLY UNJUSTIFIABLE, IN VIEW OF THE STATUTE'S FAIR MARKET VALUE REQUIREMENT

When Congress was dissatisfied with the competitive limitations and public returns from cash bonus bidding, it specified new leasing systems for testing, including the profit share bid system. It thus became the Secretary's duty at the very least to test the one non-bonus bidding system that has been used successfully for a substantial period of time. For more than 30 years the State of California has successfully leased offshore oil and gas properties by the variable net profit share bidding system, one of the new systems specified in the 1978 amendments. The Court of Appeals ruled that the Secretary is required by the statute to test that promising system (Petition for Certiorari, App. A at 44a-46a, 47a, 49a). An additional basis for that duty arises from the statute's requirement that leasing shall "assure receipt of fair market value," for the California profit share bid system has achieved far greater public returns on every dollar of oil and gas recovered than has federal bonus bidding.

Fair public return is one of the goals identified in the 1978 law in Section 102(2) (43 U.S.C. § 1802(2)). While all those goals were to be promoted by the experimental leasing program (see H. Rept. 95-590, at 140), with respect to one of them Congress went further. In addition to the goal "to insure the public a fair and equitable return," in new section 208 (43 U.S.C. § 1344(a)(4)) Congress mandated that "*leasing activities shall be con-*

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front-end payments even if less ultimate revenue results in years after they have left office. The Chairman of the House Committee noted in 1977 the problem "that OMB and others count on revenue from OCS sales as part of their budget process" and that "this 'need for money' has led to opposition to other bidding systems that might eventually provide higher revenue totals, but which would reduce bonus revenues in a particular year . . ." (Hearings on H.R. 1614, at 261).

ducted to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government." There is no way "to assure" receipt of fair market value from OCS leasings as long as DOI continues to refuse to test the profit share bidding system which shows prospects for greater federal returns. Since California has long been receiving greater returns from profit share bidding, it is demonstrable that the Secretary of Interior is defaulting on the statute's assured fair value requirement by his refusal to test or use that system.

i. *Enactment of the fair market value provision reflected Congressional doubts whether bonus bidding was yielding a fair public return.* As early as the 94th Congress witnesses had emphasized the inadequate assurances of fair return from bonus bid leasing. Thus, in 1974 Congressman Dingell testified that the investigations of his House subcommittee showed DOI unable to assure " 'that the government received fair value for the (OCS) tracts it leases' " (H. Rept. 94-1084, at 61). The Congress responded to that concern. As stated in House Report 94-1084 (at 78) an "underlying concern of the Committee, which is reflected in various provisions of H.R. 6218, is that the preesnt system provides too many advantages for industry at the possible expense of the taxpayer." The taxpayer loss was highlighted further in the supplemental views of eight committee members (*id.* at 249-50), urging use of new leasing systems in more than 10% of the leases (a position later accepted by the 95th Congress):

> "By requiring a large payment of money, at the outset, the bonus bid has effectively precluded smaller companies from entering the OCS leasing process. Studies by both the Federal Trade Commission and the General Accounting Office have shown that the use of the front-end bonus bid discourages competition. While the legislation also would probihit anti-competitive joint bidding between major companies,

unless the use of the front-end bonus is restricted, the ability of smaller companies to participate in OCS activities will remain negligible.

Moreover, commitment of such large amounts of capital prior to development of a lease senselessly ties up money the lessee ought to have available for speedy exploration of a lease . . .

Coastal states in the business of producing offshore reserves have been using many of the proposed alternative leasing methods for many years with enormous success, as have most foreign producing nations.

Significantly, the rate of return to the states and foreign governments under these methods has been far superior to that received by the U.S. Treasury.

For example, California has received about 48 percent of total gross revenues from production under so-called 'experimental' lease terms, as compared to the 16⅔ percent the Federal government will realize from all but three of the Federal OCS tracts leased off Southern California last December. In the East Wilmington Field, off Long Beach, California, the City of Long Beach, as trustee for the state, has received a 94 percent net profit share of all production. In Indonesia, under similar production sharing agreements, the Indonesian government has received up to 95 percent of all net profits.

There clearly is no reason why the U.S. government cannot do as well for its people as foreign governments and U.S. states have done for theirs when leasing oil and gas properties. In each of these cases, the lessees are the same oil companies which we have been told would refuse to bid for leases under any methods other than the front-end bonus. The record, however, both in the United States and abroad, where these companies have been actively engaged in offshore drilling, belies these claims."

By the time the legislation was later enacted in 1978 with its fair market value requirement, the Comptroller General had issued five relevant reports warning that

there was no assurance of fair return from bonus bidding, because of unavoidable uncertainty about the ultimate value of OCS properties being leased and the low level of bidding competition by the oil companies. See Appendix C *infra*, p. 4a. Indeed, the extent of Interior's unconcern whether the value from OCS leasing inures to the public or to the oil companies was dramatically illustrated in a portion of one of those GAO reports (*infra*, pp. 5a-6a), which explained:

> "Interior is attempting to enhance the competitive climate in Shelf leasing. It is proposing new bidding and data disclosure regulations and is undertaking a review of alternative bidding systems. There is merit to Interior actions to create a competitive environment for lease offers.
>
> Some Interior officials argue that the costs to society of overestimating public resource values are greater than the costs of underestimating resource values. The argument is that if the Government overestimates the resource value of a tract, and the high bid is less than the Government estimates, then the tract usually will not be leased and developed, and the net value of oil will not be recovered. On the other hand, if the Government underestimates resource value, the economic rent of the resource will not be fully captured by the public. However, an Interior official said that this does not mean that the value is lost, only that it accrues to the high bidder (petroleum company) instead of the Treasury. We and others would argue, however, that this is a critical point since these are the public's resources and it is the Government's job to not give them to industry for less than they are worth."

On March 7, 1977, GAO testified before the House Committee as follows (Hearings on H.R. 1614, pt. 1, at 232):

> "For OCS sale No. 35 we found that the Department of the Interior's tract selection and evaluation process was not reliable and that bidding was not generally competitive.

> Tracts were selected for leasing without obtaining adequate information to assess their resource potential and to meet the Department's then existing acreage goal of 10 million acres each year.
>
> . . .
>
> Consequently, decisions to lease tracts were not reliable and could not reasonably assure that the public received a fair market value return for the resources leased."

The last of the five GAO reports (*infra*, p. 8a), issued shortly before enactment of the 1978 amendments, summarized the repeated concern about inadequate return from bonus bid leasing:

> "About 60 percent of the tracts in Sale C1 receiving bids got only one or two bids. For Sale 35 and Sale 40 respectively, about 70 percent and 49 percent of the tracts bid on got one or two bids.
>
> . . .
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> The high percentage of one and two bid tracts in Sale C1 is, to us, the primary indicator of inadequate sale competition. As stated in our Sale 35 and Sale 40 reports, a competitive leasing program is based on the premise that competition will provide a fair market value return. When competitive conditions do not exist, however, it becomes increasingly important to have reliable tract values to use as the basis for accepting or rejecting bids. When large percentages of the total tracts in a sale receive one or two bids per tract and are minimally valued based on poor information, there can be no assurance that the public received a fair market value return for the potential resources leased." [10]

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[10] On August 15, 1977 a DOI memorandum to the Secretary (see *supra* p. 16, n. 4; Policy Paper at 35) similarly stated:

> "One problem is the inability to determine how well or how poorly we are doing in our attempt to obtain fair market value for specific tracts. While no bid rejection system that is dependent on the seller's pre-sale estimate of an item having an uncertain value can ensure that the item's true value will

Congress gave credence to the GAO reports. The House Committee (H. Rept. 95-590 at 110-11) highlighted GAO's conclusions as follows:

> "The GAO found that because the prelease tract selections and evaluations were based on minimal and insufficient resource information, that the estimates of tract values were unreliable, hence the return to the public based upon the fair market value could not reasonably be assured. A full 84 percent of the tracts offered either showed no resource value, or insufficient resources to sustain profitable operations, some due to the limits of present technology. Potential revenues initially put at $2.3 billion were overestimated fivefold with the final results showing that only 24 percent of the tracts were leased, producing $417 million for the Treasury. The GAO also assailed the competitive aspects of the lease sale pointing out that of 231 tracts only 70 received bids, and the majority of tracts bid on, that is 70 percent, secured only one or two offers.
>
> . . .
>
> The Select Committee considered the criticisms and recommendations of the GAO. As suggested, the passage of H.R. 1614 will ameliorate many problem areas identified by various GAO reports and testimony before the Committee."

The Senate report was even more emphatic. Noting that "all those concerned with revision of the Outer

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be received, it is possible to improve the likelihood of this happening through the use of a well-designed procedure.

A second problem derives from the interpretation of "fair market value." We have argued previously that the efficacy of a leasing arrangement should ordinarily be measured by the magnitude of government receipts. Accordingly, even if the current procedure were successful in encouraging receipt of "fair market value," a different procedure might well be capable of generating a greater amount of government receipts. In fact, it is not likely that the current procedure promotes maximization of government receipts, because the uncertainty of a tract's true value is not incorporated into the analysis."

Continental Shelf Lands Act of 1953 should be aware of the very significant findings" of the GAO, the Report (S. Rept. 95-284, at 60) proceeded to digest the three GAO reports which had already issued. The Senate digest of the 1975 report repeats GAO's conclusion that the OCS leasing programs "[d]o not reasonably insure that a fair market value return is received on lease offers of shelf oil and gas resources" (*id.* at 65). It includes GAO's conclusion (*id.* at 66) that "estimates of tract values were not reliable and could not reasonably assure that the public received a fair market value return from the leases." [11] These Congressional expressions underscore the major importance of the 1978 statute's fair market value requirement.

ii. *The statutory mandate that leasing shall assure fair market value is being violated by the Secretary's refusal to test the net profit share bidding system which has yielded California greater returns than the Federal Government receives from bonus bidding.* Committee members noted (*supra*, p. 29), and the record makes clear (see JA 51-53), that California has achieved 48% participation in the oil and gas yield of its leases awarded by profit share bidding. By contrast, on bonus bid leases since 1972 the Federal Government is receiving less than a 30%, and after 1975 as low as a 21.4% net participa-

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[11] DOI remains unable to evaluate tract resources reliably as a means of assuring fair return from cash bonus bidding. The May 5, 1980 GAO report on OCS Lease Sale 48 found (at 26) that the industry high bids on the sale were *20 times greater* than DOI's presale estimate of cash bonus values. And even the Secretary concedes the inadequate public return from bonus bidding in the presence of large discoveries or price increases. As stated in a May 12, 1980 Secretarial Issue Document on Sale A62 (filed by defendants in the District Court on August 25, 1980) the Department conceded (at 27) that although the emphasis on the front-end bonus "provides the lessor with maximum protection against a dry-hole risk . . . this protection costs the lessor through minimal royalty participation in the gains from unexpectedly large discoveries or price increases."

tion (see J.A. 125-45; 188-91; 206-23). Since each OCS lease sale involves billions of dollars of ultimate oil and gas revenue, when the California leasing system can yield 25¢ more public return on every dollar of oil and gas produced the potential loss from DOI's unaltered bonus bidding course is massive. Under these circumstances the Secretary clearly cannot "assure" fair public return from OCS leasing as long as he refuses to test the bidding system which has proved to yield far greater returns.

This basic claim of violation, asserted by plaintiffs at the very outset of this litigation (see JA 93-96), has never been factually refuted by defendants. True, the 1981 affidavit by DOI official Heintz—upon which Secretary Watt relies for his decision to make no use of net profit share bidding and work commitment bidding (see Appendix B *infra*, p. 2a) predicts that if high profit shares are bid to acquire a federal bonus lease the lessee may not develop the property in full, with the result that there will be reduced production and public returns. But there is no suggestion anywhere in the affidavit that under California's profit share bid system there has actually been incomplete development of leases. DOI's speculative reasons for refusal to use profit share bidding are also answered in the Department of Energy's profit share bidding regulation issued in May 1981 (46 Fed. Reg. 29683-84) which refutes claims that under profit share bidding there would be inadequate development of leases (DOE's conclusions are set forth in Appendix D *infra*, p. 10a).

In any event, Congress looked to the new leasing systems to secure higher returns to the public treasury (see *supra*, pp. 27-28). DOI's speculation about nondevelopment is hardly adequate to exclude from the *experimentation* program a fair test of the non-bonus bidding system which has had long successful use in California, and which Congress included among the experimental systems after hearing the same pessimistic predictions DOI is

now voicing. (See generally testimony of Shell Oil witness Hart, Hearings on H.R. 1614, at 941, 943; testimony of Exxon witness Loftis, *id.* at 1197.) The Secretary's concern that under profit share bidding leases will not be fully developed is the same prediction expressed to the Congress in the testimony of the major oil companies which Congress did not consider sufficiently cogent to exclude profit share bidding from the specified experimental leasing program. As the Court below notes (see Petition for Certiorari, App. A at 43a) Congress was unimpressed by such testimony that variable profit share bidding "would encourage irresponsible bidders" and "discourage perseverance in drilling."

Finally, in § 1337(a)(3) of the law (43 U.S.C. § 1337 (a)(3)), Congress anticipated and solved the very problem of underdevelopment which the Secretary cites, by the provision that the Secretary "may, in order to promote increased production on the lease area . . . reduce or eliminate any royalty or net profit share set forth in the lease for such area." As this was explained in House Report 95-590 (at 136), "Several options provide for minimum royalties and net profit share. It might become uneconomic during later phases of production to exploit resources because of these," so the Secretary "is given authority, after production has commenced, to reduce or eliminate any royalty or net profit shares so as to encourage complete exploitation of the resources in a lease area." Secretary Watt's rationalization for refusing to test profit share bidding thus overlooks the very provision enacted to answer the concern he voices.

In sum, the Secretary's pessimistic conjectures about the system which has yielded greater public returns to California cannot overcome the force of the statute's fair market value requirement. There is no experience in California's long and successful use of profit share bid leasing to support the Secretary's speculation, refuted

even by the Department of Energy's recently published regulation. The very point of the mandated experimental program is to put speculation to the test of leasing. Accordingly, the Court below was correct in requiring the Secretary to make good faith resort to profit share bidding during the remainder of the experimental leasing program, and its ruling should be affirmed.

III.

DEFENDANTS' VIOLATIONS CAUSE TANGIBLE INJURIES TO PLAINTIFFS WHICH GIVE THEM STANDING TO SEEK RELIEF IN THIS ACTION

There is so little merit to defendants' "standing" objections that they briefed them in the Court of Appeals only as an afterthought, following the argument of the case (see Petition for Certiorari, App. A at 51a n.*). As that Court found, respondents more than satisfy the standing requirements articulated by this Court—namely a distinct and palpable injury: and a fairly traceable causal connection between the injury and the conduct challenged in this action. This conclusion applies to each group of plaintiffs in this litigation: (1) the State of California, which is an involuntary partner with the Federal Government in OCS leases of "drainage" tracts; (2) California and the City of Long Beach, which jointly compete with the Federal Government for private company leases of off-shore oil and gas properties; and (3) consumers of oil and gas and of other oil and gas-derived products. Moreover, since each group of plaintiffs has standing in its own right, the finding of standing as to any one group makes unnecessary the resolution of the standing issue as to the others. *Cf. Buckley* v. *Valeo*, 424 U.S. 1, 12 (1976).[12]

[12] We recognize that petitioners have challenged the standing of each category of plaintiffs on both constitutional and statutory grounds. Our presentation focuses primarily upon the constitutional issue because all plaintiffs clearly fall within the zone of interests to be protected by the statute. As to California, as co-

The 1978 OCSLA amendments added a new provision to the statute, 43 U.S.C. § 1349, entitled "Citizens suits, jurisdiction and judicial review." That provision au-

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lessor with the Federal Government, *see, e.g.*, 43 U.S.C. § 1332(4)(B):

> "It is hereby declared to be the policy of the United States that...
>
> (4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments—
>
> (B) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf; . . ."

In addition, receipt by a sovereign state of a fair return for depletion of its resources is a valid legal interest within the meaning of 43 U.S.C. § 1349(a)(1).

As to California and Long Beach as competitors of the Federal Government, the statute sought to protect the interests of governmental entities affected by OCS development. *See* 43 U.S.C. § 1332, *supra*. Certainly the rate of return accruing to State and local lessors, whose activities further another statutory goal, prompt development of the OCS, is one of those interests to be protected.

Finally, as to the consumer plaintiffs, the statute, whose purposes are to increase supply and development of oil and gas in a competitive manner, was enacted in large part for the benefit of those who consume those resources. As the Court below stated (Petition for Certiorari, App. A at 52a, n*):

> "It is even more readily apparent that the consumer appellants have standing to sue for violation of an Act designed to increase competition and to step up utilization of energy resources on the OCS. Consumers are the ultimate beneficiaries of both vigorous competition and greater availability of domestic fuel. Here the consumer appellants contend that appellees' leasing activity causes direct harm to consumers by inflating prices, limiting supplies, and restricting choice on the market. This is the type of economic harm commonly present in consumer based litigation."

thorizes "any person having a valid legal interest which is or may be adversely affected" to seek relief by civil action including a suit "challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this subchapter, or any regulations promulgated under this subchapter, or the terms of any permit or lease issued by the Secretary under this subchapter . . ." (subsections (a)(1), (6)). This provision was enacted to serve a broad remedial purpose (H. Rept. 95-590, at 161):

> "Subsection 23(a) provides for citizens' suits against any person including any governmental agency (including the Department of Interior or other agencies or departments with regulatory or enforcement authority as to OCS activities), alleged to be in violation of the Act, applicable regulations, or the terms of any lease or permit issued under the Act.
>
> This subsection provides that suits may be brought by 'any person having a valid legal interest which is or may be adversely affected.' Thus, the scope of persons who can sue are those who can show an actual interest that is being negatively affected, or will be negatively affected at a reasonable time in the future. The interest must be discernible and ascertainable. Standing to sue includes not only those who have an economic interest, or who have suffered or will probably suffer a tortious injury, but also those who may have a definable aesthetic or environmental interest. Specifically, the Committee intends that this includes persons who meet the requirement for standing to sue set out by the Supreme Court in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972)."

The House Report (at 52) further emphasized that "citizen suits are authorized by anyone having an interest that can be adversely affected against the relevant government agency or department . . . ." See also S. Rept. 95-284 at 80. The remedial purpose was further underscored by the Senate Report's comment (at 81) that

"The possibility of a citizen suit should help to keep program administrators 'on their toes.'" The California plaintiffs and the consumer plaintiffs each have clear standing to sue under this citizen suit provision, because they are injured in several respects by the Secretary's violations here at issue.

A. The State of Caliofrnia Has Standing as A co-Lessor

California is an involuntary partner with the Federal Government in federal lease revenues from OCS leases in "drainage" situations. When the Federal Government owns one portion of an OCS oil or gas pool and the state owns another, the statute provides that a fair share of the federal revenues from the lease shall be yielded to the state pursuant to an agreement between the parties. See 43 U.S.C. § 1337(g)(4). The very first OCS sale held after this suit was filed (in June of 1979) involved such "drainage" pools, as did the recent lease sale held in July of 1981, and sharing arrangements have been proposed by the Government to California on those sales. See Opposition to Petition for Certiorari, Appendix B. The public record discloses that additional drainage tracts will be leased off the California coast during and after the five year experimental period (see e.g., DOI 1981 Environmental Impact Statement on Lease Sale 68 to be held in June 1982).

When California is thus an involuntary partner in federal leasing off the California coast, it has an obvious financial stake in federal use of a leasing system—such as net profit share bidding—which can yield greater revenues to be shared with the State than the present bonus bidding system.[13] Where one half of an off-shore

[13] Although the 1978 amendments provide for a fair distribution between a co-lessor state and the Federal Government, the distribution requirement merely provides that California will receive its pro rata share of the revenues actually received under the lease. No court could order that California, or any state, receive more than its pro rata share of the royalties received because

pool of oil and gas is owned by California, use of profit share bidding by the Federal Government could net California 12 cents more on each dollar of oil and gas produced. See *supra*, p. 33. When each OCS lease sale involves billions of dollars in projected oil and gas resources, a twelve cent loss for California on every dollar's worth of resources is a large loss indeed. Thus the Secretary's refusal to make any resort to the profit share bidding system denies California the prospects of hundreds of millions of dollars in greater shared federal revenues.

Petitioners claim that California's interest in securing a fair return for the depletion of its valuable natural resources is an insufficient basis for standing in the present cases because the relief respondents seek would not guarantee that the Secretary of the Interior would use a non-cash bonus bid for any drainage pool off the coast of California (Brief at 21). It is not surprising that petitioners fail to cite a single case in support of this proposition,[14] since this Court has made clear that no

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the Federal Government leased the property at a disadvantageous rate. Only by forcing the petitioners to experiment with systems promising greater public returns as Congress mandated, will California be assured of receiving a fair return on *its* resources. *Cf. Consolidated Edison Co.* v. *Montana*, 49 U.S.L.W. 4957 (July 2, 1981).

[14] Clearly, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) and *Warth* v. *Seldin*, 422 U.S. 490 (1975), are inapplicable here. In both cases, the Court ruled plaintiffs lacked standing because some independent action of a third party was necessary for the plaintiffs' injuries to be effectively redressed. Here, it is the Secretary of the Interior, *a defendant in this case*, who would decide to use an alternative bidding system in a California "drainage" situation. Additionally, this Court in *Simon* said that the "relevant inquiry is whether . . . the plaintiff has shown an injury to himself *that is likely* to be redressed by a favorable decision" (426 U.S. at 38, emphasis added). No "guarantee" was required. *See also United States* v. *SCRAP*, 412 U.S. 669 (1973) (plaintiffs found to have standing). Certainly the relief sought in *SCRAP* would not have "guaranteed" that the environmental injuries complained of would have been remedied.

such "guarantee" is required. In *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court recognized that "there can be little doubt that [plaintiff] meets the constitutional standing requirements" although "an injunction [granting the relief sought] would not . . . guarantee that [the project] will be built" (*id.* at 261). Standing was established because "[t]he challenged action . . . stands as an absolute barrier to [the project]" (*id.*). Such is the case here. Although experimental use of alternative bidding systems may not guarantee the use of superior bidding systems for a particular California "drainage" parcel, the refusal to experiment "stands as an absolute barrier" to the use of these leasing systems off the coast of California. Clearly, the State, as co-venturer, has standing to challenge the Federal Government's failure to implement this Congressionally mandated experiment, when such failure stands as a barrier to bidding systems that could provide higher returns to the Federal and State co-lessors.

B. The State of California and the City of Long Beach Have Standing as Competitors of the Federal Government

In cooperation with the City of Long Beach, the California State Lands Commission leases California's offshore oil and gas properties to private companies and receives revenues from production based on a share of net profits, which revenues represent in aggregate nearly 50% of the value of the resources obtained. As is set forth in the verified complaint (JA 86-88), to which defendants have never provided any factual rebuttal or contest, California is strongly disadvantaged in selling its own OCS leases when the Federal Government leases similar tracts on terms much more favorable to the lessees. When the Federal Government continues to sell massive bonus bid leases on the West Coast on a basis that yields to the purchasers a far higher share of the oil and gas produced (as high as 78% in recent years), it seriously

impairs the terms that California can obtain from sale of its own profit share leases. Moreover, there is question to what degree California's lessees will continue to develop the existing leases which provide a lower profit than do federal bonus bid leases; if the Federal Government continues with bonus bidding and large oil and gas reserves are discovered, then California's lessees may prefer to exploit such federal leases. Finally, the revenues California can obtain from its existing leases are endangered when producers on federal properties can market their oil and gas at far lower rates, since they have to yield only 22% return to the lessor instead of the far larger share payable to California under profit share leases.[15]

Petitioners have argued here also that the relief sought would not *guarantee* the competitor-plaintiffs a higher return on their lease sales (Brief at 20-21). But, as noted above, no such guarantee is required. If the Secretary of the Interior is now required to experiment with alternative bidding systems, as mandated by Congress, the Secretary will be in a position to determine which system returns the highest royalty to the public treasury and "it is likely", *Simon, supra*, 426 U.S. at 38, that he will choose such a system. And what is not merely likely but a present fact is that the Secretary's exclusive recourse to bonus bidding leasing, contrary to the statute's mandate to test systems likely to yield greater public returns, subjects California to present disadvantageous competition from unnecessarily generous federal oil and gas leases.

C. Direct Injuries to Consumers Give Them Standing

The Government's inaction in this case has caused the consumer plaintiffs two distinct injuries, both of which Congress sought to prevent by the passage of the 1978

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[15] Petitioners criticize the absence of "factual findings" on the standing issue (*see* Brief at 20-22). But Petitioners presented no evidence in the District Court to challenge plaintiffs' verified allegations of injury and causation.

Amendments.[16] First, the Secretary of the Interior's failure to experiment with alternative bidding systems fosters a continued lack of competition for OCS leases, which results in higher prices to consumers. Congress provided for antitrust policy review by the Department of Justice prior to award of any lease (43 U.S.C. § 1337(c)), and diversification of OCS lease acquisitions to include smaller independent companies was a central stated purpose of the new leasing methods (*supra*, pp. 14-18). This diversification in the acquisition of federal oil and gas resources was obviously for the benefit of both consumers and producers. No less than under the antitrust laws involved in *Reiter* v. *Sonotone Corp.*, —— U.S. ——, 99 S.Ct. 2326 (1979), the statutory violations here give rise to consumer injury and standing to sue. As the Court below properly found (Petition for Certiorari, App. A at 54a) the statute clearly authorizes citizens affected by environmental considerations to bring actions and the consumers here are at least as adversely affected as are members of the public by environmental damage from OCS leasing.

Second, the bonus bidding used by the Secretary has resulted in acquisition of practically all the OCS leases by the major oil producers, who have a long track record of stockpiling the leases rather than developing them. Only last year the Secretary of Interior pointed out that the industry is "holding millions of acres without any

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[16] Petitioners' argument that respondents' assertions of injury and causal nexus are nothing more than "an ingenious exercise in the conceivable" (Brief for Petitioners at 17, quoting *SCRAP*) ignores the fact that it was a specific concern with this form of injury and this very causal connection that prompted Congress to enact the 1978 amendments. Congress imposed an experimentation program "(A) to make [oil and gas] resources available to meet the Nation's energy needs as rapidly as possible, . . . and (D) to preserve and maintain free enterprise competition" (43 U.S.C. § 1802(2)).

sign of an effort to explore those leases." [17] Congress foresaw that the new leasing systems which would bring in smaller producers who do not have the capacity to make massive investments for hoarding would yield faster oil and gas production from the OCS. That is the thrust of the repeated assertion in the Congressional reports that the new leasing systems would promote greater recovery of resources (*see supra*, pp. 17-18, 28-29; and citations by the Court below, Petition for Certiorari, App. A at 31a, n.67).

The Secretary's unlawful failure to use new bidding systems which could yield more rapid oil and gas production by the smaller companies thus provides a second clear form of injury to consumers, who have been subjected in recent years to severe gasoline shortages and are threatened with future shortages. Within the statute's terms, the Secretary's refusal to use new bidding systems which would diversify OCS holdings and help alleviate the prospects of repeated gasoline shortages, clearly threatens the consumer plaintiffs' "valid legal interest which is or may be adversely affected." [18]

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[17] In a DOI release on October 23, 1980, then Secretary Andrus pointed out that "the foreign-owned Shell Oil Company now owns 44 leases offshore, some for a period of four to five years, on which there has been no drilling or development, and industrywide there are nearly 700 leases offshore on which there has been no drilling. Conservatively, these 700 leases, averaging more than 5,000 acres each, constitute a total of 3.5 million acres not yet drilled." The Secretary concluded that "credibility is strained when industry cries out for the leasing of more Federal lands, while at the same time holding millions of acres without any sign of an effort to explore those leases."

[18] *Amicus* and petitioners, see Brief for Petitioners at 24, claim that if the Court finds that status as consumer is sufficient to challenge federal leasing policies, such a finding will significantly delay development of the OCS "in direct opposition to the congressional purpose." Specifically, *Amicus* claims that expedited development was the primary purpose behind the 1978 Amendments (*see* Brief for *Amicus* at 5-12). Our reading of the legislation does not confirm that claim. But, even if it were accepted *arguendo*, the only

In sum, there are multiple injuries and prospects of injury here both to the consumer plaintiffs and the California plaintiffs. One chief objective of the 1978 reforms was to win a greater share of the returns from lessees' oil and gas production. As co-lessors and also as competing lessors with the federal government, the California plaintiffs have a direct stake in achievement of that objective by the required testing of the promising new leasing systems. Another major objective of the law is to increase smaller-company access to the vital OCS resources. The consumer plaintiffs have a manifest stake in the required testing of new systems likely to meet that goal, both because of the product competition benefits which would result and the greater oil and gas production which Congress foresaw as a consequence of more diversified ownership of OCS leases.

Finally, the loss to plaintiffs and the public from the Secretary's refusal to carry out the statute's experimentation mandate is not just on individual leases during the five year experimental period which could yield

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proper effect of a finding of this primary purpose would be to limit the relief available to plaintiffs with proper standing, not a finding that they lack standing. If development of OCS resources is the Act's primary goal, this will determine, through a balancing of the equities, whether or not an injunction should be issued. This is exactly what has happened in the instant case. The district court twice, and the circuit court once, determined that, on balance, an injunction should not be issued. Indeed, the decision by the Court below also supports this in that the Court did not enjoin the issuance of the 1980 leases but rather gave only prospective relief which should not have delayed development.

Finally, the contention that judicial curtailment of the statute's citizens suits right would promote oil development has a hollow ring. Secretary Andrus' public disclosure that the major oil companies are hoarding OCS leases (*supra*, n. 17), underscores that it is precisely the use of bidding systems that would bring in smaller companies—as Congress intended—that would promote faster oil production than the Secretary's unrelenting bonus-bidding course.

more competition, more oil and gas, and more public revenues. There is loss also in the ability to show significant benefits from new non-bonus bid leasing methods which could be utilized in OCS leases scheduled after the present experiment ends. In requiring five years of experimentation Congress was not conducting research for its own sake, but looking for means to improve the results for the remainder of this century in the projected sale of vast untapped OCS lands. When the stakes are so large and the injuries so clear, denial of standing would effectively repeal the important citizens suit provision of the statute. While federal agencies never like to be sued, it is for Congress to determine whether judicial review is available. Here Congress has made it available, so as to keep program administrators "on their toes," and the Court below properly found that plaintiffs have standing to seek relief.

CONCLUSION

When in 1975 the Department of Interior revealed to the GAO its unconcern that immensely valuable OCS properties were being leased to the oil companies without assurance of fair public return (*infra*, pp. 5a-6a), the Comptroller General replied that "these are the public's resources and it is the Government's job to not give them to industry for less than they are worth." Reflecting the same view, and desiring to end monopolization of the OCS by the largest companies, in 1978 Congress mandated a five year experiment to test six new bidding systems. The Secretary's refusal to test any of the three non-bonus bidding systems incorporated in the amendments violates the clear statutory mandate for experimentation and wholly defeats its central remedial purpose. Particularly unjustifiable, in view of the statute's fair market value requirement, is the Secretary's refusal to test the profit share bidding system long and successfully used by the State of California.

Under these circumstances the lower court's order that the Secretary immediately commence the required good faith experimentation was an appropriate vindication of the federal law. With three years of the five year experimentation period already gone, we urge that the Court issue a prompt affirmance of the ruling below.

Respectfully submitted,

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APPENDICES

APPENDIX A

STATISTICS ON ALL OCS LEASE SALES HELD SINCE SEPTEMBER 1978 [1]

Source: United States Department of the Interior, Bureau of Land Management, Periodic Outer Continental Shelf Statistical Summaries

Type of Bonus Bid System	Bids Received Per Tract Offered	Bids Received Per Tract Bid On	Tracts Acquired by Top 20 Producers [2]
16% Fixed Royalty	1.7	3.0	77.0%
30% Fixed Royalty	3.3	4.1	81.8%
Sliding Scale Royalty	1.6	3.0	88.4%
Fixed Profit Share	0.8	2.2	83.1%
POST-1978 TOTALS:	1.6	3.0	80.6%
PRE-1972 TOTALS: [3]	1.71	3.5	80.0%
1972-1978 TOTALS: [3]	1.26	2.77	67%-87%

[1] Sales covered: #65(10/31/78), #51(12/19/78), #49(2/28/79), #48(6/29/79), #58(7/31/79), #58A(11/27/79), Beaufort Sea (12/11/79), #42(12/18/79), #A62(9/30/80), #55(10/21/80), #62(11/18/80), #53(5/28/81), RS-1(6/30/81), #A66(7/21/81). 16% Fixed Royalty used in all sales except Beaufort Sea. 30% Fixed Royalty used only in sales #A62, #62. Sliding Scale Royalty used in all the sales. Fixed Profit Share used in sales #A62, #55, #62, #53, #A66.

[2] Sales #53 and #A66 are not included in Top 20 totals because Interior has not yet accepted the bids on these sales. Data on these sales and on sale RS-1 obtained from Bureau of Land Management Recap Sheets.

[3] Source: JA 41-42, 44.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1633

ENERGY ACTION EDUCATIONAL FOUNDATION, *et al.*,
Plaintiffs,

v.

JAMES G. WATT, *et al.*,
Defendants.

AFFIDAVIT

CITY OF WASHINGTON
DISTRICT OF COLUMBIA

AFFIDAVIT OF JAMES G. WATT, SECRETARY OF THE INTERIOR

James G. Watt, being duly sworn, deposes and states the following:

1. As Secretary of the Interior, it is my duty to administer the provisions of the Outer Continental Shelf Lands Act relating to the leasing of the continental shelf for mineral exploration and development. Under Section 8 of the Act, I must determine which bidding system to use when offering OCS leases for sale.

2. Based on current information and analyses, explained in the affidavit of H. Theodore Heintz, Jr., I do not believe the purposes of the OCS Lands Act or the best interests of the nation would be served by the use of bidding systems having either a profit share or a

work commitment as the bid variable. Therefore, absent a judicial mandate to use profit share and work commitment bidding, I do not intend to use these bidding systems in OCS leasing.

/s/ James G. Watt
JAMES G. WATT
Secretary of the Interior

Subscribed and sworn to before me, this 8th day of May, 1981.

/s/ Richard R. Lee
Notary Public

My Commission expires: April 14, 1982.

APPENDIX C

EXCERPTS FROM 1975-1978 GAO REPORTS[1]

The GAO report issued on March 19, 1975 pointed out that in view of the very limited presale information about the value of the oil and gas of the OCS properties, adequate bidding competition is required to assure a fair public return from bonus bid leasing (Outlook for Federal Goals to Accelerate Leasing of Oil and Gas Resources on the Outer Continental Shelf, p. 25):

> "One of the goals of Interior's Shelf leasing program is to insure a fair return to the public from the distribution of minerals from public lands. Before leasing Shelf acreage, Survey evaluates the oil and gas potential of tracts to establish a value for each tract offered. We found that inadequacies in the Government's tract selection and evaluation practices existed even at a 3-million-acre leasing rate. This subject will be covered in detail in a separate GAO report which will be issued early in 1975. To proceed with the projected leasing schedule will mean that the Government's role of protecting the public interest in Shelf lease offers will potentially be jeopardized. Lower quality and/or the lack of evaluation caused by an accelerated leasing program will mean increased reliance on bid competition as the only means to insure that a fair return is received for leased resources."

The *June 30, 1975* GAO report ("Improvements Needed in Determining Where to Lease and at What Dollar Value"), concluded (p. 33) that "The existence, magnitude and economic producibility of oil and gas on the Shelf cannot be definitely determined before drilling.

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[1] The five GAO reports appear as Exhibits 1-5 attached to Plaintiffs' District Court Reply Memorandum of July 14, 1980.

Because of inadequate data and analysis the Federal Government cannot reasonably insure that a fair market value is received in lease sales of Shelf oil and gas resources in which competition is not adequate to protect the public interest." The report detailed the significance of adequate pre-sale valuations of OCS properties, as follows (p. 16):

> "After industry has nominated the tracts they are interested in, and before offering tracts for lease offer, Interior conducts a preoffer evaluation of the resource potential of each tract. This is an independent evaluation of the worth of each tract offered for lease and the estimated value is used as a primary factor in determining the acceptability of industry bids.
>
> The results of overvaluation and undervaluation of tracts are difficult to assess. Tracts overvalued in relation to industry bids might result in turning down a bid even if there appears to be adequate competition. On the other hand, those undervalued would likely be awarded at less than fair value if there is inadequate competition and could be a bargain to the high bidder.
>
> In situations where the market functions well; e.g., when there are many bona fide bidders and the market is truly competitive, there would be no need for a valuation system to develop a presumed market price.
>
> Interior is attempting to enhance the competitive climate in Shelf leasing. It is proposing new bidding and data disclosure regulations and is undertaking a review of alternative bidding systems. There is merit to Interior actions to create a competitive environment for lease offers.

> Some Interior officials argue that the costs to society of overestimating public resource values are greater than the costs of underestimating resource values. The argument is that if the Government overestimates the resource value of a tract, and the high bid is less than the Government estimates, then the tract usually will not be leased and developed, and the net value of oil will not be recovered. On the other hand, if the Government underestimates resource value, the economic rent of the resource will not be fully captured by the public. However, an Interior official said that this does not mean that the value is lost, only that it accrues to the high bidder (petroleum company), instead of the Treasury. We and others would argue, however, that this is a critical point since these are the public's resources and it is the Government's job to not give them to industry for less than they are worth."

The *March 7, 1977* GAO report on OCS Sale No. 35, stated (p. ii) that the DOI's pre-sale tract evaluations "were made using inadequate data," and as a result "estimates of tracts values were not reliable and could not reasonably assure that the public received a fair market value return from the leases." As concerns competition, the report found (p. 30):

> "Competitive leasing programs are based on the premise that competition will provide a fair market value for the product sold. This is only true, however, when highly competitive market conditions exist . . .
>
> Sale #35s' results show a lack of competition. Of the 231 tracts offered only 70 (about 33 percent) received bids and 56 (24 percent) were eventually leased. Additionally, the majority (70 percent) of the tracts bid on received only one or two bids each; of the 56 tracts leased, 36 tracts received only 1 or 2 bids (30 of these tracts had one bid)."

As a basis for the report's conclusion (pp. 41-42) that the leasing procedures used do not provide "an adequate level of assurance that fair market value is received," the GAO explained that "the present system results in the real evaluation of resource potential after the lease sale, a situation we consider contrary to normal business practices of knowing the value of products and services sold."

The *June 28, 1977* GAO report on OCS Sale 40 was released on an expedited basis "because of the need to issue the report before passage of pending OCS legislation" (p. 38). Its repeated theme was that fair value from bonus bid leasing was questionable, because of the limited information about the value of the properties and the low level of bidding competition for cash bonus leases (p. 8):

> "Obtaining additional geologic data with interpretations would help establish a more reliable tract value. These values are used as the basis to accept or reject industry bids. The combination of unreliable tract values with limited bidding competition (70 percent of the tracts bid on in Sale 35, and 49 percent of the tracts bid on in Sale 40 got only 1 or 2 bids) reduces the chances of the public receiving the fair market value return on all tracts for the resources sold."

Similarly, the GAO stated (p. 19):

> "Our March 7, 1977, report on Sale 35, demonstrated that inadequate data existed to properly value the resource potential of tracts in that sale. Our analysis of Sale 40 shows that the Department continued to make tract evaluation decisions without sufficient data and interpretation for analysis. Tract value estimates were speculative and could not reasonably assure that the public received a fair market value

return for each lease offering since inadequate competition existed for about 50 percent of the tracts.

Although the report noted some increase in competition over Sale 35, it warned (p. 27): "the high percentage of one and two bid tracts in Sale 40 still indicates inadequacies in sale competition. As stated in our Sale 35 report, a competitive leasing program is based on the premise that competition will provide a fair market value." GAO ultimately concluded (A. 414) that "operation of the present leasing program is not the best way to develop OCS resources," and brings into question "the public's right to receive a fair market value."

On *June 8, 1978*, shortly before the final enactment of the 1978 amendments, GAO's report on the Lower Cook Inlet Sales reasserted its earlier conclusions (p. 23):

> "About 60 percent of the tracts in Sale C1 receiving bids got only one or two bids. For Sale 35 and Sale 40 respectively, about 70 percent and 49 percent of the tracts bid on got one or two bids.
>
> . . . .
>
> The high percentage of one and two bid tracts in Sale C1 is, to us, the primary indicator of inadequate sale competition. As stated in our Sale 35 and Sale 40 reports, a competitive leasing program is based on the premise that competition will provide a fair market value return. When competitive conditions do not exist, however, it becomes increasingly important to have reliable tract values to use as the basis for accepting or rejecting bids. When large percentages of the total tracts in a sale receive one or two bids per tract and are minimally valued based on poor information, there can be no assurance that the public received a fair market value return for the potential resources leased."

The report summarized the several reports as follows (A. 457):

"In our June 30, 1975, report to the Congress, we stated that the effectiveness of the Department's OCS evaluation program was being hampered by inadequate data and analysis. Because of poor or missing geological data, the Department was conservatively estimating tract dollar values in undeveloped areas. Our March 7, 1977, report on Sale 35 demonstrated that there wasn't enough data to properly evaluate the resource potential of tracts in that sale. Our analysis of Sale 40 again showed that the Department continued to make tract evaluation decisions without sufficient data. And, our analysis of Sale CI also found this same problem with the Department's evaluation process. Tract value estimtaes for Sale CI cannot reasonably assure that the public received a fair market value return for each lease offering, particularly since inadequate competition existed for about 60 percent of the tracts."

APPENDIX D

EXCERPT FROM MAY 1981 DOE PROFIT SHARE BIDDING REGULATION (46 FED. REG. 29683-84)

DOE shares concerns over possible speculation in the use of the variable net profit share bidding system, but not to the extent expressed in the comments. The assumption that speculative bids will be submitted for tracts offered under this bidding system presumes that the associated fixed cash bonus will be established at levels low enough that speculators will be relatively indifferent to its loss if the tract proves valueless, as a number of comments mentioned. A speculative bidder considering whether to bid an inordinately high net profit share must weigh the consequences of obtaining an OCS lease encumbered by such terms. The expected rate of return on a lease with a high net profit share term might well be critically reduced, with the result that the tract might well become an unattractive candidate for assignment or farmout. Development might be uneconomical, unless other tracts overlying a field are unitized. Since the variable net profit share bidding system virtually eliminates the prospect for unusually large profits to lessees, and the risk of faulty bidding remains, there appears little justification for apprehension that this regulation will foster waves of speculative bidding.

Both DOE and DOI are cognizant of the possibility of speculation under the variable net profit share bidding system, and intend to cooperate to eliminate such speculation as does occur. While DOE agrees with the comment that manipulation of the capital recovery factor for specific leases will not deter speculators from bidding, other means of eliminating or at least limiting speculation, and its undesirable effects, are available. Prior to an OCS lease sale, fixed cash bonuses must be established for each tract offered under the variable net profit share bidding system. The level of these cash bonuses may be set sufficiently high as to deter speculative bids.

It should also be noted that the Secretary of the Interior is under no obligation to accept bids for OCS leases, and may in his discretion reject the high bid on any tract.

Moreover, pursuant to section 5(a)(7) of the OCSLA, DOI has promulgated regulations to "assure prompt and efficient exploration and development of lease areas," in 30 CFR Part 250. DOI may be expected to enforce these regulations against speculative lessees . . . .

The comments were generally critical of the probable effects of a variable net profit share bidding system on OCS exploration and development. As already mentioned, many respondents indicated their belief that the use of a net profit share term as the bid variable devalued resource evaluation prior to lease issuance, with consequent delays in exploration and development. It becomes advantageous to the lessee then to postpone as much exploration activity as possible until after lease issuance when capital recovery treatment is available.

Other comments cited a lack of incentive for rapid exploration and development in the absence of a high cash bonus, or "sunk cost," to spur operations on a variable net profit share OCS lease. Since at the time of lease issuance the lessee's only tangible investment in a variable net profit share lease is the fixed cash bonus, there is a lack of inventive to recoup that investment, relative to work commitment bid leases, cash bonus bid leases, or other high front-end investments that promise a comparable return on investment. This lack of incentive allows the lessee to focus on alternative investment opportunities, on the OCS or otherwise, and to premise exploration and development activities on successful operations on tracts adjacent or nearby. Such waiting delays development and production; in the event that adjacent tracts are not proven, the lessee may never undertake any exploratory activities. Under such circumstances, even well-intentioned operators may find it beneficial to act speculatively. However, a supporter of variable net profit share bidding asserted to the contrary, that OCS

tracts leased under this bidding system would be explored and developed at least as diligently as tracts leased under a cash bonus bid system.

DOE takes serious note of these possible effects of this regulation, but discounts the likelihood of their widespread occurrence. Left to themselves, lessees might act in the manner described in the comments. However, the OCSLA and implementing DOI regulations have given DOI powerful means to enforce compliance with the general provisions of the OCSLA and of leases issued pursuant to the statute. These means include exploration plans, development and production plans, fines, lease forfeiture, and prohibitions on participation in future OCS lease sales.

. . . .

DOE shares these concerns [about sustained production], as its own analysis yields similar results. As a means to mitigate partially these anticipated drawbacks to use of this bidding system, DOE notes the availability of capital recovery treatment for allowable exploration and development costs.

Before any net profit share payments are owned to the government, the lessee is entitled to recoup all its allowable costs, plus an additional percentage of such costs incurred during the capital recovery period through application of the capital recovery factor. Assuming a technically producible field, the ability to recoup costs may provide some incentive to complete development and initiate production. This ability might postpone the point at which the lessee considers production uneconomic. Also, the lessee always recoups all of its allowable costs, whenever incurred during the life of the lease, though the election to end the capital recovery period is irreversible.

Other than incentives provided by the ability to recoup costs, DOE again points out the existence of enforceable DOI regulations relative to prompt exploration and development of leases and the requirement for a lessee to file exploration and development and production plans.

Office-Supreme Court, U.S.
FILED
OCT 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE AFFIDAVITS FROM OFFICERS OF INDEPENDENT OIL COMPANIES THAT BEAR UPON A QUESTION POSED BY THE COURT AT ORAL ARGUMENT

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Pursuant to Rule 42 of the Rules of this Court, Respondents respectfully request leave to file the following Affidavits:

Affidavit of Robert S. Friedenberg, President
Seahawk Oil International, Inc.

Affidavit of Arnold Berkowitz, President
Atlantic Sun Oil Company

Affidavit of Richard G. Johnson, President
Western Energy Consultants, Inc.

Affidavit of W.E. Richardson, President
Mission Exploration Inc.

Affidavit of Lloyd S. Grearson, President
Pan Energy Resources, Inc.

Affidavit of David A.C. Clark, President
Albion International Resources, Inc.

These affidavits, which are attached as an appendix hereto, discuss events following the oral argument in this case that bear upon a question posed by Justice Stevens during argument on October 5, 1981. In support of this Motion, Respondents state as follows:

1. At argument in this case on October 5, 1981, Justice Stevens questioned Respondents' counsel about the absence of oil producers from the plaintiff group. Reports of that question were published in the press, including a report in *The Oil and Gas Journal* dated October 12, 1981, which was read by affiants, officers of independent oil companies. Affiants, who had no previous contact with this case or the parties, contacted Respondents after reading the article.

2. As the affidavits indicate, these companies, which participate in Outer Continental Shelf ("OCS") lease sales conducted by the United States, wish to bring to the Court's attention their vital interest in Respondents' expeditious use of non-bonus bid systems for the sale of Outer Continental Shelf oil and gas leases. In addition, the affiants wish to explain to the Court their absence from this proceeding, of which they learned for the first time through the recent press reports, and their intention promptly to seek to intervene in the ongoing proceeding in the District Court.

3. Rule 35 of the Rules of this Court permits a party, by leave of Court, to present to the Court in a supplemental brief intervening matters that were not available in time to have been included in the brief in chief. The attached affidavits fall within the ambit of intervening matters in that the affiants provide new and pertinent in-

formation that is responsive to the Court's inquiry at oral argument and may assist the Court in its disposition of the questions presented. Because the affidavits are clear as to the relevance of the facts presented therein to the case at bar, Respondents do not believe it is necessary or appropriate to file a supplemental brief in accompaniment of the affidavits.

For the foregoing reasons, Respondents respectfully request that the instant motion be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 80-1464

JAMES G. WATT, Secretary of the Interior, *et al.*
Petitioners,

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, *et al.*
Respondents.

STATE OF CALIFORNIA)
) ss:
ORANGE COUNTY)

AFFIDAVIT OF ROBERT S. FRIEDENBERG

I, Robert S. Friedenberg, having been duly sworn, do hereby state as follows:

1. I am the president of Seahawk Oil International, Inc. (Seahawk), a New Jersey corporation with headquarters in Newport Beach, California.

2. Seahawk's business includes the acquisition of oil and gas exploratory licenses, permits and leases that allows the company to participate in oil and gas exploratory development operations. The company participates in Outer Continental Shelf oil and gas lease sales conducted by the United States.

3. On October 13, 1981, I read an article entitled "High Court Hears OCS Bidding Case" that appeared in the *Oil and Gas Journal* dated October 12, 1981. A copy of the article is attached hereto. The article indicated that the case was before the Court for the Court's review of the question of "whether the Interior Secretary is required or is merely permitted to experiment with alternate OCS bidding systems.

* * * *

They [alternative bidding systems] include non-bonus systems such as profit share and work commitment bid-

ding to permit smaller companies to compete more easily than they might under the usual bonus bidding with fixed royalties." The article also reported a statement attributed to Justice Stevens as follows:

> "If bidding systems inequities are so bad, Justice John Paul Stevens said, 'it is curious there are no oil companies to share your view' and join in the lawsuit."

4. Because Seahawk is very much interested in the government's use of alternate bidding systems in place of the cash bonus system, I telephoned the offices of the Energy Action Foundation in Washington, D.C. the same day to inquire about the lawsuit referenced in the article and to ascertain whether it would be possible to bring to the Court's attention the vital interest of Seahawk, and similar companies with which we are in contact, in the expeditious use of non-bonus bid systems for the sale of OCS oil and gas leases. The utilization of such systems will increase substantially our opportunity to participate successfully in such sales. Before telephoning Energy Action on October 14, 1981, I had no prior contact with them or any other party to the litigation, nor was I aware of the lawsuit itself.

5. Because the comment attributed to Justice Stevens in the *Oil and Gas Journal* article raises a question about the non-participation in the litigation of companies such as Seahawk, I wish the Court to understand that I am now advised for the first time of the pendency of this litigation and that Seahawk intends promptly to apply to intervene in the ongoing lawsuit in the District Court.

/s/ Robert S. Friedenberg
ROBERT S. FRIEDENBERG

Sworn and subscribed to before me this 16 day of October, 1981.

/s/ Linda L. Smith
Notary Public

HIGH COURT HEARS OCS ALTERNATIVE BIDDING CASE

In the first case of the fall term, the U.S. Supreme Court last week heard arguments over whether the Interior secretary is required or is merely permitted to experiment with alternative OCS bidding systems.

The 1978 Outer Continental Shelf Lands amendments required the Interior secretary to experiment with five alternative bidding methods for offshore lease sales.

They included nonbonus systems such as profit share and work commitment bidding to permit smaller companies to compete more easily than they might under the usual bonus bidding with fixed royalties.

Energy Action Foundation, California Lands Commission, and city of Long Beach sued Interior Sec. James Watt earlier this year to force him to use the alternative systems and won an appeals court ruling.

Justice Department attorney Louis Claiborne told the Supreme Court Interior has examined the alternative bidding systems and has decided "they will not produce the desired results" in increasing offshore development and intercompany competition.

"What deters the smaller firms is the enormous cost and risk," he said.

Claiborne added that if anyone has a complaint about the use of bidding systems it should be Congress—which wrote the law—and "Congress so far has been content to leave well enough alone."

John Silard, a Washington attorney for Energy Action, argued that the Energy secretary was required by law to experiment with the systems for 5 years and that he doesn't have the option to reject the new bidding methods yet.

He quoted Watt as telling a congressional committee 3 months ago that the alternative bidding systems are "failures."

The lawyer declared the Reagan administration is interested only in raising "up front money to help balance the budget" and not improvement of competition in offshore development.

Silard conceded that the law may not require Interior to try all of the alternative bidding systems, but it clearly demands that it experiment with at least a couple of those alternatives.

If bidding system inequities are so bad, Justice John Paul Stevens said, "it is curious there are no oil companies to share your view" and join in the lawsuit.

A decision in the case is not expected for several months. (Emphasis supplied.)

SUPREME COURT OF THE UNITED STATES

No. 80-1464

JAMES G. WATT, Secretary of the Interior, *et al.*
Petitioners,

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, *et al.*
Respondents.

STATE OF CALIFORNIA)
) ss:
ORANGE COUNTY)

AFFIDAVIT OF W. E. RICHARDSON

I, W. E. Richardson, having been duly sworn, do hereby state as follows:

1. I am the president of Mission Exploration Inc., a [Texas] corporation with headquarters in Houston, Texas.

2. Mission's business includes the acquisition of oil and gas exploratory licenses, permits and leases that allows the company to participate in oil and gas exploratory development operations. The company participates in Outer Continental Shelf oil and gas lease sales conducted by the United States.

3. On October 13, 1981, I received from Robert Friedenberg, the President of Seahawk Oil International, Inc., a copy of an article entitled "High Court Hears OCS Bidding Case" that appeared in the *Oil and Gas Journal* dated October 12, 1981. A copy of the article is attached hereto. The article indicated that the case was before the Court for the Court's review of the question of "whether the Interior Secretary is required or is merely permitted to experiment with alternate OCS bidding systems.

* * * *

They [alternative bidding systems] include non-bonus systems such as profit share and work commitment bidding to permit smaller companies to compete more easily than they might under the usual bonus bidding with fixed royalties." The article also reported a statement attributed to Justice Stevens as follows:

> "If bidding system inequities are so bad, Justice John Paul Stevens said, 'it is curious there are no oil companies to share your view' and join in the lawsuit."

4. I wish to bring to the Court's attention the vital interest of Mission in the expeditious use of non-bonus bid systems for the sale of OCS oil and gas leases. The utilization of such systems will increase substantially our opportunity to participate successfully in such sales.

5. Prior to my execution of this Affidavit, I had no contact with any party to the litigation, nor was I aware of the pendency of the lawsuit before the United States District Court in the District of Columbia. Because the comment attributed to Justice Stevens in the *Oil and Gas Journal* article raises a question about the non-participation in the litigation of companies such as Mission, I wish the Court to understand that I am now advised for the first time of the pendency of this litigation and that Mission intends promptly to seek to intervene in the ongoing lawsuit in the District Court.

/s/ William E. Richardson

Sworn and subscribed to before me this 16 day of October, 1981.

/s/ Linda L. Smith
Notary Public

SUPREME COURT OF THE UNITED STATES

No. 80-1464

JAMES G. WATT, Secretary of the Interior, *et al.*
Petitioners,

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Respondents.

STATE OF CALIFORNIA)
) ss:
ORANGE COUNTY)

AFFIDAVIT OF ARNOLD BERKOWITZ

I, Arnold Berkowitz, having been duly sworn, do hereby state as follows:

1. I am the president of *Atlantic Sun Oil Co.*, a [Pennsylvania] corporation with headquarters in Philadelphia, Pennsylvania.

2. Atlantic's business includes the acquisition of oil and gas exploratory licenses, permits and leases that allows the company to participate in oil and gas exploratory development operations. The company participates in Outer Continental Shelf oil and gas lease sales conducted by the United States.

3. On October 13, 1981, I received from Robert Friedenberg, the President of Seahawk Oil International, Inc., a copy of an article entitled "High Court Hears OCS Bidding Case" that appeared in the *Oil and Gas Journal* dated October 12, 1981. A copy of the article is attached hereto. The article indicated that the case was before the Court for the Court's review of the question of "whether the Interior Secretary is required or is merely permitted to experiment with alternate OCS bidding systems.

• • • •

They [alternative bidding systems] include non-bonus systems such as profit share and work commitment bidding to permit smaller companies to compete more easily than they might under the usual bonus bidding with fixed royalties." The article also reported a statement attributed to Justice Stevens as follows:

> "If bidding system inequities are so bad, Justice John Paul Stevens said, 'it is curious there are no oil companies to share your view' and join in the lawsuit."

4. I wish to bring to the Court's attention the vital interest of Atlantic in the expeditious use of non-bonus bid systems for the sale of OCS oil and gas leases. The utilization of such systems will increase substantially our opportunity to participate successfully in such sales.

5. Prior to my execution of this Affidavit, I had no contact with any party to the litigation, nor was I aware of the pendency of the lawsuit before the United States District Court in the District of Columbia. Because the comment attributed to Justice Stevens in the *Oil and Gas Journal* article raises a question about the non-participation in the litigation of companies such as Atlantic, I wish the Court to understand that I am now advised for the first time of the pendency of this litigation and that Atlantic intends promptly to seek to intervene in the ongoing lawsuit in the District Court.

/s/ Arnold Berkowitz

Swon and subscribed to before me this 16 day of October, 1981.

/s/ Linda L. Smith
Notary Public

SUPREME COURT OF THE UNITED STATES

No. 80-1464

JAMES G. WATT, Secretary of the Interior, *et al.*
Petitioners,

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, *et al.*
Respondents.

STATE OF CALIFORNIA)
) ss:
ORANGE COUNTY)

AFFIDAVIT OF RICHARD G. JOHNSON

I, Richard G. Johnson, having been duly sworn, do hereby state as follows:

1. I am the president of Western Energy Consultants, Inc., a California corporation with headquarters in Newport Beach, California.

2. Western's business includes the acquisition of oil and gas exploratory licenses, permits and leases that allows the company to participate in oil and gas exploratory development operations. The company participates in Outer Continental Shelf oil and gas lease sales conducted by the United States.

3. On October 16, 1981, I received from Robert Friedenberg, the President of Seahawk Oil International, Inc., a copy of an article entitled "High Court Hears OCS Bidding Case" that appeared in the *Oil and Gas Journal* dated October 12, 1981. A copy of the article is attached hereto. The article indicated that the case was before the Court for the Court's review of the question of "whether the Interior Secretary is required or is merely permitted to experiment with alternate OCS bidding systems.

• • • •

They [alternative bidding systems] include non-bonus systems such as profit share and work commitment bidding to permit smaller companies to compete more easily than they might under the usual bonus bidding with fixed royalties." The article also reported a statement attributed to Justice Stevens as follows:

> "If bidding system inequities are so bad, Justice John Paul Stevens said, 'it is curious there are no oil companies to share your view' and join in the lawsuit."

4. I wish to bring to the Court's attention the vital interest of Western in the expeditious use of non-bonus bid systems for the sale of OCS oil and gas leases. The utilization of such systems will increase substantially our opportunity to participate successfully in such sales.

5. Prior to my execution of this Affidavit, I had no contact with any party to the litigation, nor was I aware of the pendency of the lawsuit before the United States District Court in the District of Columbia. Because the comment attributed to Justice Stevens in the *Oil and Gas Journal* article raises a question about the non-participation in the litigation of companies such as Western, I wish the Court to understand that I am now advised for the first time of the pendency of this litigation and that Western intends promptly to seek to intervene in the ongoing lawsuit in the District Court.

/s/ Richard G. Johnson

Sworn and subscribed to before me this 16 day of October, 1981.

/s/ Linda L. Smith
Notary Public

SUPREME COURT OF THE UNITED STATES

No. 80-1464

JAMES G. WATT, Secretary of the Interior, *et al.*
Petitioners,
v.
ENERGY ACTION EDUCATIONAL FOUNDATION, *et al.*
Respondents.

STATE OF CALIFORNIA)
) ss:
ORANGE COUNTY)

AFFIDAVIT OF LLOYD S. GREARSON

I, Lloyd S. Grearson, having been duly sworn, do hereby state as follows:

1. I am the President of Pan Energy Resources, Inc., a Pennsylvania corporation with headquarters in *West Chester*, Pennsylvania.

2. Pan Energy's business includes the acquisition of oil and gas exploratory licenses, permits and leases that allows the company to participate in oil and gas exploratory development operations. The company participates in Outer Continental Shelf oil and gas lease sales conducted by the United States.

3. On October 16, 1981, I received from Robert Friedenberg, the President of Seahawk Oil International, Inc., a copy of an article entitled "High Court Hears OCS Bidding Case" that appeared in the *Oil and Gas Journal* dated October 12, 1981. A copy of the article is attached hereto. The article indicated that the case was before the Court for the Court's review of the question of "whether the Interior Secretary is required or is merely permitted to experiment with alternate OCS bidding systems.

* * * *

They [alternate bidding systems] include non-bonus systems such as profit share and work commitment bidding to permit smaller companies to compete more easily than they might under the usual bonus bidding with fixed royalties." The article also reported a statement attributed to Justice Stevens as follows:

> "If bidding system inequities are so bad, Justice John Paul Stevens said, 'it is curious there are no oil companies to share your view' and join in the lawsuit."

4. I wish to bring to the Court's attention the vital interest of Pan Energy in the expeditious use of non-bonus bid systems for the sale of OCS oil and gas leases. The utilization of such systems will increase substantially our opportunity to participate successfully in such sales.

5. Prior to my execution of this Affidavit, I had no contact with any party to the litigation, nor was I aware of the pendency of the lawsuit before the United States District Court in the District of Columbia. Because the comment attributed to Justice Stevens in the *Oil and Gas Journal* article raises a question about the non-participation in the litigation of companies such as Pan Energy, I wish the Court to understand that I am now advised for the first time of the pendency of this litigation and that Pan Energy intends promptly to seek to intervene in the ongoing lawsuit in the District Court.

/s/ Lloyd S. Grearson

Sworn and subscribed to before me this 16 day of October, 1981.

/s/ Linda L. Smith
Notary Public

SUPREME COURT OF THE UNITED STATES

No. 80-1464

JAMES G. WATT, Secretary of the Interior, *et al.*
Petitioners,
v.
ENERGY ACTION EDUCATIONAL FOUNDATION, *et al.*
Respondents.

STATE OF CALIFORNIA)
) ss:
ORANGE COUNTY)

AFFIDAVIT OF DAVID A. C. CLARK

I, David A. C. Clark, having been duly sworn, do hereby state as follows:

1. I am the president of Albion Int'l Resources, Inc. a Deleware corporation with headquarters in Newport Beach California.

2. Albion's business includes the acquisition of oil and gas exploratory licenses, permits and leases that allows the company to participate in oil and gas exploratory development operations. The company participates in Outer Continental Shelf oil and gas lease sales conducted by the United States.

3. On October 16, 1981, I received from Robert Friedenberg, the President of Seahawk Oil International, Inc., a copy of an article entitled "High Court Hears OCS Bidding Case" that appeared in the *Oil and Gas Journal* dated October 12, 1981. A copy of the article is attached hereto. The article indicated that the case was before the Court for the Court's review of the question of "whether the Interior Secretary is required or is merely permitted to experiment with alternate OCS bidding systems.

* * * *

They [alternative bidding systems] include non-bonus systems such as profit share and work commitment bidding to permit smaller companies to compete more easily than they might under the usual bonus bidding with fixed royalties." The article also reported a statement attributed to Justice Stevens as follows:

> "If bidding system inequities are so bad, Justice John Paul Stevens said, 'it is curious there are no oil companies to share your view' and join in the lawsuit."

4. I wish to bring to the Court's attention the vital interests of Albion in the expeditious use of non-bonus bid systems for the sale of OCS oil and gas leases. The utilization of such systems will increase substantially our opportunity to participate successfully in such sales.

5. Prior to my execution of this Affidavit, I had no contact with any party to the litigation, nor was I aware of the pendency of the lawsuit before the United States District Court in the District of Columbia. Because the comment attributed to Justice Stevens in the *Oil and Gas Journal* article raises a question about the non-participation in the litigation of companies such as Albion, I wish the Court to understand that I am now advised for the first time of the pendency of this litigation and that Albion intends promptly to seek to intervene in the ongoing lawsuit in the District Court.

/s/ David A.C. Clark
DAVID A.C. CLARK

Sworn and subscribed to before me this 16th day of October, 1981.

/s/ Linda L. Smith
Notary Public

Office - Supreme Court, U.S.
FILED
SEP 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1464

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
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Office of the General Counsel
Department of Energy
Washington, D.C. 20585

TABLE OF AUTHORITIES

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1464

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

Anxious to avoid subjecting the Court to much more of our dull prose (see Resp. Br. 1), we submit only the briefest reply to respondent's unrestrained arguments.

1. For obvious reasons, respondents largely ignore the statutory text and pitch their case on legislative history. They find there a Congressional concern with the traditional bidding formula, which, among other things, was thought to restrain competition and favor only the largest companies. Whatever the merits of that appraisal, we do not question that Congress believed there should be some degree of experimentation with bidding schemes other than the prevailing system under which royalty was fixed at 16 2/3% and leases were awarded on the basis of relatively large "front-end" bonus bids. But whether the many references to "bonus bidding" cited by respondents actually referred to this historical scheme or, more comprehensively,

all systems involving a cash bonus as the bidding element is not entirely clear on the face of the debates and reports. As the case is presented by respondents, the issue is how one resolves that ambiguity.

Our submission is that the statute itself is so plain that there is no pretext to explore the legislative history. Moreover, if we must follow respondents into that thicket, performing the task of statutory construction in reverse, we believe the fair inference from what was said and written is the same. But even accepting that some of the expressions encountered in the debates and reports can be viewed as ambiguous, one is surely entitled to settle any doubt by looking to the words of the law as it was ultimately enacted. The final text, intended to be given statutory force, must be taken to represent the ultimate Congressional resolution of any earlier hesitations, or vascillations, or contradictions. The statute is, after all, the last statement of intent; it is, moreover, the only formal and binding expression of the legislative will.

There may be rare occasions when one is justified in disregarding even plain statutory language when it is wholly at odds with incontrovertible evidence of a different legislative intent, or when the words of the statute, read literally, produce absurd results that one ought not attribute to Congress. This is no such case, however.

Here, the most respondents can demonstrate is that the legislative history is inconclusive. To be sure, there may have been individual Members who shared the special enthusiasm of respondents—some of them active advocates during the framing of the 1978 OCSLA Amendments—and who would have mandated bidding on a profit share or work commitment basis. But the more authoritative statements of the legislative concensus are wholly consistent with the broader administrative discretion reflected in the enacted statute. Reading the committee reports alone, it

might perhaps be possible to suppose that subscribing members viewed all bonus systems as one and meant to require the Secretary to offer some leases under schemes where bonus was not the variable. That is not, however, the only plausible interpretation, or the most likely. And when we look at the text that emerged, we know Congress did not take this view, but, on the contrary, expressly distinguished between the traditional system and other bonus bidding formulae. There is no contradiction: the statute merely resolves any ambiguity in the reports.

Nor can the plain meaning of the statutory text be rejected on the ground that it would defeat the legislative objective, or otherwise lead to improbable consequences. Indeed, it is obvious that any concern about the anti-competitive effects of the traditional scheme under which a relatively large front-end cash bonus was required could be satisfied without eliminating bonus bidding. All that was necessary was to diminish the prominence of that ingredient in the formula, although retaining cash bonus as the bid variable. This could be accomplished by increasing the fixed royalty above the traditional 1/6th, or by establishing a sliding-scale royalty that would yield, in the aggregate, more than 1/6th, or by providing for payment of a share of net profits in lieu of or in addition to a fixed royalty, or by requiring a substantial fixed work commitment combined with a reservation of royalty or fixed net profit share, or both, or by any other combination of larger "downstream" payments with a cash bonus bid.

So, also, these variants in bonus bidding systems, introducing new elements, would provide some indication of the virtue of the profit-share, work commitment, and sliding-scale royalty schemes in maximizing government revenues and encouraging production. At the least, it was reasonable for Congress to take that view and to treat the new bonus bidding systems now authorized as significantly different

alternatives to the traditional formula. Accordingly, it is not surprising that the statute permits the Secretary to adhere to bonus bidding, provided only he experiments with systems that also include new ingredients.

2. Turning briefly to the statutory text, respondents attempt to define the Secretary's discretion: "the discretion left the Secretary was not *whether* to test promising new leasing systems but only *where* and *when* to apply a particular new system" (Resp. Br. 20-21). On its face, this means that, within the five-year period beginning with enactment of the OCSLA Amendments in 1978—or perhaps during each of those years—the Department of the Interior must offer some leases under each and every one of the alternative bidding systems. Yet, respondents themselves seem to lack the courage of their convictions, being apparently willing to excuse the Secretary from experimenting with certain listed schemes, notably those in which royalty is the bid variable. See Resp. Br. in Opp. 23-25 & n.14.

A sufficient reason not to press the point to its logical conclusion is that the number of alternative bidding systems embraced by the OCSLA Amendments is far too large. There are at least ten different schemes enumerated in Section 8, and each is subject to adjustments in the relative prominence of the several ingredients characterizing the particular mixture, which can significantly alter the equation. When one adds the "catch-all" provision of Section 8(a)(1)(H), the variety of possible combinations is multiplied manifold. Obviously, no one could insist that every possibility be used. There is, to be sure, a statutory mandate that, for at least 20% of the total acreage offered each year, bidding systems other than the traditional one must be employed. But *which* ones is left to the Secretary. The statute does not prefer one alternative scheme over another: the Secretary must make that choice, in his discretion.

3. Respondents press a further argument: that by adhering to bonus bidding, whatever the other ingredients of the total formula, the Secretary is violating the Congressional mandate to assure that the government receives "fair market value" for its outer continental shelf mineral resources. The short answer to this contention is that it has never been tried or decided by the courts below. See Pet. App. 94a. At this juncture, there is only a bare allegation, claimed to be supported by statistics which are not admitted and from which no relevant finding of fact has been made. The court of appeals could not, and did not, rest its judgment on any such ground and it would be obviously inappropriate for this Court to affirm on the basis of these untested allegations.[1]

At all events, there are fundamental flaws in respondents' "fair market value" argument. First, the market value of a mineral lease when first granted cannot be measured in terms of the value of the oil and gas ultimately extracted. Obviously, the varying costs and risks of exploration and development affect the market price any bidder will offer, especially in the unproven areas of the outer continental shelf where drilling is both extremely costly and very hazardous. In some circumstances, the best return that can be obtained is a relatively small percentage of the gross value of the minerals. In a different situation, that percentage will be significantly higher. And, in those cases where no production is ultimately obtained, any bonus received will be a windfall to the government, wholly unrelated to the actual worth of the resource, although it accurately represents the fair market value of the right to explore at the time it was offered.

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[1]Equally unsubstantiated is respondents' repeated claim that the experience of California—very limited and obviously distinguishable—demonstrates the benefits of net profit share bidding. That contested proposition is not supported by any trial court finding.

The last example illustrates the benefit to the United States of insisting on a substantial bonus payment in all cases. No doubt, in some recent instances, the amount paid for the lease, even though fair at the time, may have appeared inadequate when measured against the greatly inflated value of the oil extracted a few years later. But that seeming disparity—partly offset by the greater worth of the dollars received at the time of leasing and increased tax revenues—is attributable to an unusual and unforeseen escalation in oil prices and cannot properly be criticized as a failure to obtain "fair market value" for the leases when granted.

Nor is it possible to say that Congress meant to foreclose such a result by requiring all leasing to be conducted on a net profit share basis. On the contrary, respondents do not now dispute that the Secretary is commanded to use the traditional cash bonus system for at least 40% of the acreage leased each year, and is authorized to use other bonus bidding formulae for at least some of the remaining acreage. It must follow that Congress did not view bonus bidding as violating the mandate to obtain "fair market value."

Finally, we must stress that the OCSLA Amendments do not treat maximizing federal revenues as the sole objective. Assuring maximum production without delay—to mention only one other—was also a goal of the Amendments. Hopefully, both things could be achieved. But, in some instances, these two objectives conflict and a balance must be struck. Reasonably enough, Congress left it to the Secretaries of Energy and Interior to determine, within broad limits, the most appropriate means to implement the stated goals. There is simply no basis for concluding that either Secretary has abused his discretion and engaged in a "giveaway." And, in any event, the scheme of the OCSLA suggests that Congress has reserved to itself the function of deciding that

question by requiring regular reports from both Secretaries and insisting upon prior submission of any new bidding system not specifically provided for. It is very doubtful that judicial appraisal of various bidding formulae was ever contemplated. See J.A. 193.

4. On the standing issue, the State respondents now invoke Section 8(g) of the OCSLA Amendments, 43 U.S.C. (Supp. III) 1337(g), which provides for agreements between the United States and coastal States "in order to permit [the] fair and equitable division" of revenues derived from federal leases which drain oil or gas partly underlying State lands. Misleading terminology aside, the basic fallacy of the argument is the premise that the "fair and equitable" share of revenues to which the State is entitled in drainage situations is necessarily a percentage of actual revenues based on the relative volume of oil or gas in the common pool on either side of the boundary line. That is no doubt one formula for apportioning revenues. But we do not suppose the State would be barred from claiming a larger share of the actual receipts if, in a suit to implement Section 8(g), it could demonstrate that the Secretary, under any bidding system, was deriving a grossly inadequate proportion of the total revenues, having indulged in a "giveaway" in favor of his lessee. In the unlikely event of such proof, Section 8(g) provides a remedy, short of interfering with the Secretary's leasing decisions.

At all events, it is clear that Section 8(g) was not intended to make the State a "co-lessor" with the United States, with a right to participate in selecting a bidding system affecting the common pool. Indeed, such a proposal was suggested and rejected by Congress. Compare H.R. Rep. No. 94-1084, 94th Cong., 2d Sess. 12-13, 95-97, 260 (1976), with H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 14-15, 219-220 (1977). Under the OCSLA Amendments, as under the original Act, leasing OCS lands remains a wholly federal matter. If the Secretary chooses to employ only the traditional

bidding system within the "border zone" potentially subject to Section 8(g), reserving the alternative bidding schemes for more seaward areas, that is a decision in which the States have no role. They have no standing by virtue of Section 8(g) to narrow the exercise of that statutory discretion, any more than they can insist on a higher or lower royalty rate, or dictate the place or time of lease offers.

5. Finally, we address a short rebuttal to respondents' suggestion (Resp. Br. 5 n.1) that the Secretary of Energy no longer has any interest in the case. To be sure, the Department of Energy has now promulgated final regulations covering the two bidding systems favored by respondents. But that was done under compulsion of a district court order implementing the court of appeals' mandate. As the preamble to each regulation makes clear, the Secretary of Energy entertains reservations about those systems. If he were freed of the judicial command, he might wish to withdraw one or both of the regulations, or to suspend them pending further study.

It remains important to the Department of Energy to vindicate its own discretion under the Act. As matters now stand, that Department has been compelled to issue regulations without having satisfied itself of their efficacy. Arguably, the decision below will not be satisfied until regulations are promulgated for every other alternative bidding system contemplated by the Amendments. At all events, if the Interior Department's position prevails, it would be anomalous to continue to require the Department of Energy to study and revise regulations respecting bidding systems that the Secretary of the Interior does not intend to invoke. The unavoidable burdens of the government are heavy enough without adding to them the wholly wasteful duty of devising further regulations that will never be implemented.

For the reasons stated here and in our principal brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

BRUCE C. RASHKOW
CHARLES W. FINDLAY, III
Attorneys

DANA B. OTT
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Department of the Interior

RICHARD A. CORREA
Office of the General Counsel
Department of Energy

SEPTEMBER 1981

DOJ-1981-09

Office-Supreme Court, U.S.
FILED
JUN 19 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1464

JAMES G. WATT, Secretary of the Interior, *et al.*,

Petitioners,

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF ATLANTIC RICHFIELD COMPANY, *et al.* AS *AMICI CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1464

JAMES G. WATT, Secretary of the Interior, *et al.*,

Petitioners,

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF ATLANTIC RICHFIELD COMPANY, *et al.* AS *AMICI CURIAE*

Atlantic Richfield Company and the eight other companies, who appeared below as amici curiae[1] and who are vitally interested in the expeditious development of the oil and gas resources on the Outer Continental Shelf (OCS), file this brief with the consent of the petitioners and respondents.

SUMMARY OF ARGUMENT

On April 6, 1981, this Court granted the Federal defendants' petition for a writ of certiorari on two issues: (1) whether the Outer Continental Shelf Lands Act, as amended (OCSLA), 43 U.S.C. § 1337, in authorizing specific bidding systems for the

[1] Chevron U.S.A. Inc., Exxon Corporation, Gulf Oil Corporation, Mobil Oil Corporation, Shell Oil Company, Tenneco Oil Company, Texaco Inc., and Union Oil Company.

sale of OCS oil and gas leases, requires the Secretary of Energy to promulgate regulations for all of those systems and the Secretary of the Interior to utilize them; and (2) whether the respondents in this case have standing to sue.

We are confident that the Federal petitioners' brief will provide the Court with an interpretation of the OCSLA bearing on the issue of the use of alternative bidding systems for OCS lease sales and will contain an analysis of the law of standing. Amici will not repeat these arguments here. Rather, this brief will review: (1) the primary congressional purpose in the 1978 Amendments to expedite exploration and development of OCS energy resources; and (2) the concommitant congressional intent to reduce litigation which might delay the OCS oil and gas program.

We stress these aspects of the statute because scrutiny of the D.C. Circuit's decision leads to the conclusion that its liberalization of the law of standing to permit increased litigation against the OCS program and its nullification of the Secretary's discretion with respect to the actual use of particular bidding methods threatens delay of the OCS program in a fashion contrary to the national interest, as expressed by Congress in the 1978 Amendments to the OCSLA.

This threat is made clear by the lower court's open-ended invitation to respondents and others dissatisfied with the pace of implementing the alternative bidding procedures authorized by the 1978 Amendments to pursue litigation to block future OCS sales:

> "Most important, by mid-1981 failure to issue regulations on variable net profit share bidding and work commitment bidding creates a clear violation of the statutory mandate to experiment with alternatives to front end cash bonus systems and accordingly a clear case of irreparable harm to appellants, and the public and private interests they represent. Thus, the public harm in losing any realistic opportunity to test all the

> OCSLA leasing methods will outweigh any incidental delay to the transaction of additional lease sales."

Energy Action Educational Foundation v. *Andrus*, slip op. No. 80-2127, at 44 (D.C. Cir. Oct. 30, 1980) (Pet. App. 49a).

Had the D.C. Circuit paid proper regard to Congress' intention to expedite OCS development and to lessen the prospect of litigation aimed at stalling OCS development, such as the present case, it would have had an appropriate appreciation of the need to respect the Secretary of the Interior's discretion in deciding which bidding systems should be used in lease sales. It also would have been far less generous in declaring that all consumers, as well as others, have standing to challenge the leasing arrangements used by the United States in disposing of Federal lands.

ARGUMENT

I. CONGRESSIONAL RECOGNITION OF THE IMPORTANCE OF EXPEDITED DEVELOPMENT OF THE OCS

A. The Primary Purpose of the OCSLA Is To Expedite the Development of OCS Resources

In 1953, the OCS Lands Act, 43 U.S.C. §1331, confirmed the Federal government's jurisdiction over all but the near-shore lands granted to States by the Submerged Lands Act, 43 U.S.C. §1301. Federal leasing on the OCS proceeded solely in the Gulf of Mexico and off California for the next two decades. However, in 1973 the Arab oil embargo made the United States acutely aware of its dependence on foreign oil imports and jolted the country into the realization that its domestic oil program must be strengthened by expanding OCS production. In 1974, Senator Henry Jackson, Senate sponsor of what were to become the 1978 Amendments to the OCSLA (S. 3221), made clear the sense of urgency felt by Congress as to the need for expedited OCS development:

> "[This] legislation . . . is of extreme importance in light of the potential catastrophic situation facing the Western World.
>
> "We are in a situation where the OPEC oil cartel is now in the process of charging prices that will transfer the wealth and resources of the Western industrialized nations almost in toto over the next many years."

120 Cong. Rec. 30981-82 (1974).

Recognizing that United States dependence on foreign oil presented perils to national security, both military and economic, and that domestic resources must be developed, Congress turned to the OCS as the single largest potential source of additional domestic energy.[2] Senator Jackson summarized Congress' aspirations for the OCS program:

> "[T]he Outer Continental Shelf is America's best hope for finding additional oil and gas resources and reducing our dependence on foreign oil."

124 Cong. Rec. S13994 (daily ed. August 22, 1978) (remarks of Sen. Jackson).

In light of the recognition of the importance of OCS development, the congressional committees approved the 1978 Amendments to the OCSLA with:

> "The basic purpose . . . to promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf."

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[2] 123 Cong. Rec. 23015 (July 14, 1977) (remarks of Sen. Jackson). For example, Representative Hyde reported that in 1976 only 14 percent of U.S. domestic oil production and 22 percent of U.S. natural gas production came from the OCS, whereas offshore potential reserves were estimated to be more than 80 percent of proven U.S. oil reserves and 47 percent of proven U.S. natural gas reserves. 124 Cong. Rec. 821 (1978) (remarks of Rep. Hyde). *See* S. Rep. No. 284, 95th Cong., 1st Sess. 42 (1977); H.R. Rep. No. 590, 95th Cong., 1st Sess. 53 (1977); 124 Cong. Rec. H8875 (daily ed. August 17, 1978) (remarks of Rep. Murphy). *See also* Library of Congress Congressional Research Service, Study on Effects of Offshore Oil and Natural Gas Development on the Coastal Zone, at 2, 8 (Comm. Print March 1976).

H.R. Rep. No. 590, 95th Cong., 1st Sess. 53 (1977). Although essentially ignored by the panel of the D.C. Circuit which rendered the decision now under review, this "basic purpose" was respected in two earlier opinions of other panels of the Court,[3] as well as those of other circuits.[4]

Finally, to underscore the preeminence of the goal of expedited OCS operations, Congress articulated as the first of the specific legislative purposes underlying the 1978 Amendments its desire to:

> "establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade . . . . "

43 U.S.C. §1802(1). Thus, from the remarks of the sponsors of the Amendments when first proposed until their adoption four years later, the need to expedite OCS development consistently remained Congress' principal purpose.

B. Section 8 of the OCSLA Reflects the Primary Congressional Purpose of Expediting the OCS Program

Congress sought to implement its primary purpose of expediting OCS development throughout the Amendments, including Section 205 which amended Section 8 of the OCSLA, 43 U.S.C. §1337, by providing for alternative bidding systems. As described by Representative Murphy, sponsor of the House bill,

> "the bill will expedite OCS development by: Eliminating bureaucratic conflicts; reducing the possibility of frivolous lawsuits; minimizing present opposition to

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[3] *See* North Slope Borough v. Andrus, 642 F.2d 589, 595 n.17 (D.C. Cir. 1980); Energy Action Educational Foundation v. Andrus, 631 F.2d 751, 761 n.58 (D.C. Cir. 1979).

[4] *See* Conservation Law Foundation v. Andrus, 617 F.2d 296, 298 (1st Cir. 1979); New York v. Kleppe, 9 E.R.C. 1793 (2d Cir. 1976).

> offshore development on the part of States and other interests; and insuring proper financial relief to coastal States, fishermen, and those affected by oilspills."

124 Cong. Rec. 814-15 (1978) (remarks of Rep. Murphy). *See also* 124 Cong. Rec. H8873 (daily ed. August 17, 1978) (remarks of Rep. Murphy).

Thus, in drafting and adopting the Amendments authorizing alternative bidding methods, Congress maintained its focus on expediting the OCS program by carefully preserving the Secretary's discretion as to whether, when, and to what extent such methods should be used. In so doing, Congress sought to ensure that disputes as to the pace of implementing Section 8 would not delay the OCS program.

In this regard, the manner in which Congress preserved the Secretary's discretion through a special provision of the OCSLA (43 U.S.C. § 1337(a)(5)(B)) giving him flexibility not to be bound by the parameters on the use of alternative bidding systems is highly significant.[5] The earliest version of this discretionary provision allowed the Secretary to deviate from the percentage requirement for untried bidding systems only through affirmative action by both Houses of Congress within thirty days. 122 Cong. Rec. 17757 (1976). However, as the minority pointed out and as was ultimately recognized, such a requirement is "a logical and practical impossibility where an actual national emergency is not involved." H.R. Rep. No. 1084, 94th Cong., 2d Sess. 262 (1976) (minority view). Thus, the House subsequently adopted an amendment requiring only prior "single House approval with detailed swift procedures for congressional consideration and action." 122 Cong. Rec. 23144 (1976).

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[5] This discretionary provision allows the Secretary to deviate from the percentage requirements otherwise governing use of cash bonus-fixed royalty bidding should he

> "determine[ ] that the requirements set forth in this subparagraph are inconsistent with the purposes and policies of this Act."

43 U.S.C. §1337(a)(5)(B).

Nevertheless, certain House members were still dissatisfied with the way in which the bidding system issue could impede OCS development. Thus, a later version of the House bill provided that the Secretary could deviate from the percentage limitations unless he was barred by a resolution of disapproval from either House of Congress within thirty days following the Secretary's notice to the Congress that he intended to depart from the parameters prescribed in the OCSLA for the use of new bidding systems. H.R. Rep. No. 590, *supra*, at 47.[6]

Even then, Congress was not satisfied, for it took one final step further and adopted the discretionary provision as it now exists—the Secretary in his discretion may deviate from percentage requirements governing use of certain bidding methods if he determines, without any congressional approval or disapproval, that such requirements are inconsistent with the purposes and policies of the 1978 Amendments. *See* 43 U.S.C. § 1337(a)(5)(B).

An early version of that provision was introduced in an amendment by Representative Brown and was then slightly altered with respect to the specific percentage requirements by Representative Emery. 124 Cong. Rec. 1639 (1978). During the floor debate on Representative Emery's amendment, it was recognized that, without the amendment, the prior Committee bill permitting only single-House disapproval of deviation from the percentage requirements could force the Secretary to use bidding systems for a certain percentage of tracts "whether or not the Secretary of the Interior in his judgment thinks that they are effective or even detrimental. His hands are tied if he so thinks." 124 Cong. Rec. 1639 (1978) (remarks of Rep. Fish).

By contrast, it was pointed out that Representative Emery's amendment, like Representative Brown's, removed that impediment and allowed the Secretary "to make that judgment himself" without going back to Congress. *Id.* Despite the

[6] At least one respondent here unsuccessfully voiced its opposition to the "Secretary's authority to waive the bidding restrictions." *See* H.R. Rep. No. 590, *supra*, at 117 (citing the testimony of James F. Flug of Energy Action).

Committee's and Representative Murphy's opposition, the Emery amendment passed. By preserving the Secretary's discretion through the special provision in Section 8, Congress unmistakably emphasized its intent not to allow disputes over the choice of bidding systems to impede the orderly progress of the OCS program.[7]

So it was that Congress changed its role as to the Secretary's use of alternative bidding systems from one of prior restraint, which could impede OCS leasing, into post-hoc oversight to provide guidance to the Secretary for future decisions.[8] *A fortiori,* courts should not invite delay in the OCS program by converting the Secretary's discretionary tasks in connection with the choice of alternative bidding systems into legally-mandated duties enforced by private plaintiffs armed with motions for injunctive relief in the manner contemplated by the D.C. Circuit. *See* pp. 2-3, *supra.*

II. CONGRESSIONAL INTENT TO REDUCE LITIGATION

The legislative history of the OCSLA demonstrates that Congress sought in the 1978 Amendments to expedite OCS oil and gas development by discouraging lawsuits of the kind brought by respondents in this case. Congress repeatedly recognized the potential for delay of OCS development posed by litigation and sought to guard against it.[9] The supporters of

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[7] *See, e.g.,* 124 Cong. Rec. 1835 (1978) (remarks of Rep. Dodd) ("The Secretary of the Interior does have the *discretionary* authority to waive certain requirements if it is determined that compliance would *unduly delay* OCS development") (emphasis added).

[8] *See, e.g.,* 43 U.S.C. §§1337(a)(8)(B), 1337(a)(9)(D), 1343(a)(2)(A). *See also* 124 Cong. Rec. 1634 (1978) (remarks of Rep. Brown) ("[T]he Congress could come in and say, 'Mr. Secretary, we are concerned about your using this system,' or in the alternative, *not* using this system") (emphasis added); H.R. Rep. No. 1214, 96th Cong., 2d Sess. 15 (1980) ("Congress decided not to accept language providing a single one-House veto on waiver of the minimum or maximum and instead intended to monitor this provision by oversight").

[9] *See, e.g.,* 124 Cong. Rec. 815 (1978) (remarks of Rep. Murphy); 124 Cong. Rec. 819 (1978) (remarks of Rep. Hughes); 124 Cong. Rec. 822 (1978) (remarks of Rep. Forsythe). *See also* 124 Cong. Rec. H8873 (daily ed. August 17, 1978) (remarks of Rep. Murphy).

the legislation continually emphasized their intention to avoid delay resulting from the kind of litigation typified by this case:

> "By opening up the OCS decision-making process in a consensus-building fashion, the bill will provide for more stable and efficient development, which will be less subject to delaying court actions. We must allow swift action on this bill to provide badly needed modernization of the outmoded 1953 act."

124 Cong. Rec. 198 (1978) (remarks of Rep. Zefferetti).[10]

Congress inserted special provisions into the OCSLA to remove litigation-induced delays to the OCS program. For example, while providing special direct review of the leasing program setting forth a five-year schedule of OCS sales, Congress created in Section 18(d)(3), 43 U.S.C. § 1344(d)(3), an exception to the usual rule permitting interim relief pending such review:

> "[L]easing shall be permitted to continue until such program is approved and for so long thereafter as such program is under judicial or administrative review pursuant to the provisions of this subchapter."[11]

Similarly, in providing for citizens' suits under Section 23, 43 U.S.C. § 1349, Congress kept in mind the need to streamline

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[10] The Ad Hoc Select Committee on the OCS emphasized the continuing need to eliminate delaying court actions:

> "Most agree that the main reason for delays in OCS development have been the lawsuits which even when successful [for the Federal government] have lead to extensive stays of activities."

H.R. Rep. No. 1835, 95th Cong., 2d. Sess. 20 (1979). *See also* S. Rep. No. 284, 95th Cong., 1st Sess. 123 (1977) (reprinting Letter to Senator Jackson from Secretary Andrus (May 13, 1977)).

[11] *See* H.R. Rep. No. 590, *supra*, at 151, explaining Congress' purpose to allow leasing to proceed during the pendency of judicial review of the leasing program.

and consolidate judicial review and curtail delaying lawsuits.[12] It specifically focused on the law of standing, and made clear its desire that standing *not* be expanded to permit increased litigation aimed at delaying OCS sales. For example, Representative Wiggins initially opposed the citizens' suit provision due to his concern that it would lead to a floodgate of law suits by parties otherwise lacking standing. Representative Eckhardt addressed this concern by delineating the restrictive nature of standing under Section 23:

> "The language here is more restrictive than the language in the Clean Air Act. Indeed, the language here essentially writes into this bill the rule of law which exists as a general proposition expressed in Kentucky Utilities[,] Flast, Data Processing, Barlow and Sierra Club versus Norton [Morton *sic*].
>
> "It was said in the Sierra Club case that where a party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on whether the party has alleged such a 'personal stake in the outcome of the controversy as to insure that the dispute sought to be adjudicated will be presented in an adversary context and in the form historically viewed as capable of judicial resolution.' "

122 Cong. Rec. 23162 (1976) (remarks of Rep. Eckhardt).

Rep. Wiggins added in response

> "that the interest of the plaintiff alleged to have been violated by the defendant must be substantial, it must be immediate, it must be real and not so peripheral as to indicate an indirect interest in the lawsuit."

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[12] Section 23 of the OCSLA provides in part that

> "any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf. . . . "

43 U.S.C. §1349(a)(1).

122 Cong. Rec. 23162 (1976) (remarks of Rep. Wiggins). Affirming Representative Wiggins' understanding that Congress did not void "the general rules of substantiality as to that interest," *id.*, Representative Eckhardt further stated:

> "[I]t would be exactly the same standard, the same type of interest, that existed in Hardin against Kentucky Utilities Co., Flast against Cohen, Data Processing Service Organizations against Camp, Barlow against Collins, and Sierra Club against Morton."

122 Cong. Rec. 23162 (1976) (remarks of Rep. Eckhardt).

Later, Congress again enunciated its intent to limit delaying lawsuits through Section 23, as evidenced in the House action taken with regard to Section 23(a) of an early Senate bill, S. 521. In response to then-Secretary Kleppe's concern that standing under Section 23(a) might be read too broadly, the Committee and the House effected

> "a *limit on such suits* by providing that only those showing a *'probability'* rather than a *'possibility'* of having an interest adversely affected can sue."

122 Cong. Rec. 30270 (1976) (reprinting Letter from Representative Murphy to Secretary Kleppe (September 2, 1976) (emphasis added)).

Finally, on the eve of House passage of the 1978 OCSLA Amendments, Representative Wiggins again noted his concern that Section 23 not be construed to broaden standing, and requested that Representative Murphy

> "affirm, if he is able to do, that it is not the intent of the Committee in recommending citizens' suits to alter the law of standing, and that we merely are adopting the law in the Alyeska case [421 U.S. 240 (1975)]."

124 Cong. Rec. 1825 (1978) (remarks of Rep. Wiggins). Representative Murphy agreed, stating "that we are not changing the standing." 124 Cong. Rec. 1825 (1978) (remarks of Rep. Murphy). Accordingly, Representative Wiggins endorsed

Section 23(a). 124 Cong. Rec. 1826 (1978) (remarks of Rep. Wiggins).

The final reports of both Houses specifically state the congressional intent that Section 23 provide standing only to "persons who meet the requirements for standing to sue set out by the Supreme Court in *Sierra Club* v. *Morton* [405 U.S. 727 (1972)]." S. Rep. No. 284, *supra*, at 81; H.R. Rep. No. 590, *supra*, at 161. The House Report further clarifies the meaning of Section 23(a):

> "Thus, the scope of persons who can sue are those who can show an *actual* interest that *is* being negatively affected, or *will probably be* negatively affected at a reasonable time in the future. The interest must be *discernible* and *ascertainable*. Standing to sue includes not only those who have an economic interest, or who have suffered or will probably suffer a tortuous injury, but also those who may have a definable aesthetic or environmental interest."[13]

H.R. Rep. No. 590, *supra*, at 161 (emphasis added).

CONCLUSION

The foregoing review of the legislative history underlying the 1978 Amendments demonstrates that Congress recognized the importance of the OCS as the single largest potential source of new domestic energy and sought to expedite its development. To do so, Congress provided the Secretary with the discretion to utilize the various bidding systems authorized by the OCSLA. In further efforts to allow for expedited OCS operations, Congress made clear its intention that litigation should be reduced, not expanded. In frustration of these congressional purposes, the D.C. Circuit's decision broadly construes standing under the 1978 Amendments and shackles the Secretary with

[13] Plaintiffs here have no aesthetic or environmental interest in the matters which they seek to litigate.

judicially-mandated and litigation-spawning requirements as to the use of bidding systems. That decision should, therefore, be reversed.

Respectfully submitted,

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